



Commission on Judicial Performance

Weaknesses in Its Oversight Have Created
Opportunities for Judicial Misconduct to Persist

April 2019

REPORT 2016-137





CALIFORNIA STATE AUDITOR

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April 25, 2019
2016-137

The Governor of California
President pro Tempore of the Senate
Speaker of the Assembly
State Capitol
Sacramento, California 95814

Dear Governor and Legislative Leaders:

At the request of the Joint Legislative Audit Committee, the California State Auditor presents this audit report of the Commission on Judicial Performance (CJP). CJP is the agency charged with investigating complaints about judicial misconduct and deciding whether to discipline California judges for violations of the code of judicial ethics, and our review found that CJP must address the following weaknesses:

- It does not consistently take all reasonable steps when it investigates alleged misconduct.
- Its structure and disciplinary processes do not align with best practices.
- It has not worked sufficiently to increase its transparency and accessibility.

In about one-third of the cases we reviewed, we found that CJP's investigators did not take all reasonable steps to determine the existence or extent of alleged misconduct, such as inappropriate demeanor or improper delegation of duties to court staff. These missed steps include not speaking with all relevant witnesses, not obtaining additional evidence, and not taking a broad approach to determining misconduct in light of a pattern of allegations. Furthermore, CJP's structure—as a single entity that both investigates alleged judicial misconduct and makes decisions about the appropriate level of discipline—results in judges facing potential discipline from a body of commissioners that is privy to unfounded allegations of misconduct. CJP also delegates responsibility for evidentiary hearings on alleged misconduct to three judges appointed by the Supreme Court of California, a practice that falls short of the voters' intent to increase the public's role in judicial discipline with the passage of Proposition 190 in 1994. Finally, CJP has not taken steps to hold meetings that are open to the public or to accept electronically submitted complaints, despite decades of public scrutiny about its lack of transparency and inaccessibility.

CJP's operations and structure must change significantly to address the issues that this audit revealed. CJP can change its internal policies to address concerns about the planning and supervision of its investigations. However, changes to CJP's structure will require an amendment to the California Constitution and CJP will need to inform the Legislature about any related funding needs as it adjusts its practices.

Respectfully submitted,

ELAINE M. HOWLE, CPA
California State Auditor

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Summary

Results in Brief

A strong judicial oversight agency is essential to maintain a fair and impartial judiciary that limits the potential for judges to abuse or misuse their power. Since its inception in 1960, the Commission on Judicial Performance (CJP) has been the single agency responsible for investigating complaints of judicial misconduct.¹ CJP's mission is to protect the public, enforce rigorous standards of judicial conduct, and maintain public confidence in the integrity and independence of the judicial system. Its 11 commissioners—consisting of judges, attorneys, and members of the public—discipline judges when CJP's staff prove with clear and convincing evidence that those judges have engaged in misconduct. Judicial misconduct usually involves behavior that conflicts with the California Code of Judicial Ethics (ethics code), which requires judges to diligently, impartially, and properly perform their duties in a way that does not undermine public confidence in the judiciary. However, this audit concludes that CJP has missed opportunities to fully investigate allegations of misconduct, has a structure and processes for discipline that do not align with best practices and falls short of the intent of the voters, and has failed to ensure it is sufficiently transparent and accessible to the public.

We found that flaws in CJP's investigative processes could allow judicial misconduct to go undetected and uncorrected. Examples of alleged misconduct from the cases that we reviewed include threatening to assault litigants, inappropriate comments, and inappropriate relationships with subordinates. When we reviewed 30 of CJP's investigations of judicial misconduct, we determined that in about one-third of those cases, investigators did not take all reasonable steps—such as interviewing relevant witnesses, obtaining necessary evidence, or observing the judges—to determine the existence or extent of alleged misconduct. For example, one case that we reviewed involved a judge who made aggressive and intimidating comments from the bench. Although CJP was able to discipline the judge for some of the allegations in this case, it did not attempt to obtain audio files that may have proved further misconduct. The weaknesses we observed in CJP's investigations are due in part to a lack of key safeguards for ensuring high quality investigations, such as documented investigation strategies and regular managerial oversight.

Audit Highlights . . .

Our audit regarding CJP's processes for investigating and disciplining judges highlighted the following:

- » *CJP's investigators failed to pursue allegations thoroughly and ignored warning signs of ongoing misconduct.*
 - *In about one-third of the cases we reviewed, investigators did not take all reasonable steps—interviewing witnesses, obtaining evidence, or observing the judges—to determine the existence or extent of alleged misconduct.*
 - *CJP does not evaluate its complaint data to identify potential patterns of judicial misconduct that could merit investigation.*
- » *CJP's structure and disciplinary proceedings are not aligned with judicial discipline best practices.*
 - *Commissioners are involved in both the investigatory and disciplinary functions, resulting in judges facing potential discipline from a body of commissioners that is privy to unfounded allegations of misconduct.*
 - *CJP's reliance on judges to hear cases involving their peers falls short of the voters' intent to increase the public's role in judicial discipline with the passage of Proposition 190 in 1994.*
- » *CJP has not taken important steps to improve its transparency and accessibility to the public.*
 - *It has rarely directed its outreach activities toward members of the public—out of more than 120 events held during a five-year period, only three targeted the general public.*

¹ Throughout this report, we use the abbreviation *CJP* to refer to the agency's 11 commissioners and 22 staff. We use the term *commission* to refer to the decision-making body of 11 commissioners.

- *CJP only accepts complaints submitted through the mail instead of allowing for more convenient submissions through its website.*
- *CJP never holds public meetings to discuss its rules or operations.*
- » *Significant changes are necessary to improve CJP's processes for investigating and disciplining judges.*
- *Changing its structure and operations would require an amendment to the California Constitution.*
- *It will need additional funding to implement improvements to its internal operations.*

Because it does not take steps to identify patterns of complaints and initiate investigations when numerous complainants allege similar problems involving a judge, CJP has also missed opportunities to detect chronic judicial misconduct. In one particularly concerning case, CJP failed to identify a pattern of complaints against a judge regarding serious on-the-bench misconduct. Although CJP eventually disciplined the judge for such behavior, it had received complaints for years preceding this discipline and yet missed these signs of potential chronic misconduct. CJP failed to identify these types of patterns in part because it does not periodically evaluate its complaint data to identify when patterns of complaints exist that could merit investigation, even if the individual complaints themselves do not warrant investigations.

Our legal system is based on the principle that an independent, fair, and competent judiciary will interpret and apply the law. The ethics code seeks to ensure such a judiciary by establishing standards for judges' ethical conduct. Therefore, CJP's role as the sole agency responsible for investigating alleged violations of the ethics code is essential to upholding the integrity of the judiciary and public confidence in the judicial system. When it does not conduct adequate investigations, CJP falls short of its fundamental charge.

Additionally, CJP's structure and disciplinary proceedings are not aligned with judicial discipline best practices because the commission currently serves as a unitary—or single—body. Because of this structure, commissioners are involved in both CJP's investigatory and disciplinary functions, and as a result, they are privy to allegations of and facts about unproven misconduct that should not factor into disciplinary decisions. Although it is not identical in nature, CJP's structure is analogous to a jury in a criminal case being composed of the detectives who investigated that case. In contrast, best practices recommend a bicameral—or two-body—structure for judicial discipline commissions. A bicameral structure would have one body responsible for investigating allegations of judicial misconduct while the other would be responsible for issuing discipline.

CJP continues to use judges called *special masters* to preside over evidentiary hearings, which are the public trial portion of disciplinary proceedings. This practice does not fully realize the intent of Proposition 190, which the voters passed in 1994. Proposition 190 sought to increase the public's role in judicial discipline through reforms that included ensuring that the majority of the commissioners were members of the general public rather than judges or attorneys. However, because these public members do not directly hear evidence or observe witnesses to assess their credibility during evidentiary hearings, judges continue to have a significant amount of influence in CJP's disciplinary process.

Since CJP's authority and structure stem from the California Constitution, reforming CJP's structure and requiring the commission to hear its own disciplinary proceedings will require an amendment to the California Constitution.

In addition to issues with its structure, CJP has not taken important steps to improve its transparency and accessibility to the public. Given that CJP has frequently been the object of public criticism, we expected it to have made significant efforts to clearly communicate with Californians about its role and operations but it has not done so. Further, greater public accessibility could allow CJP to better fulfill its mission because it would likely lead to more complaints about potential misconduct. Nonetheless, CJP has rarely directed its outreach activities toward members of the public, does not accept complaints on its website, and never holds meetings that are open to the public. As a result, CJP has missed opportunities to make Californians aware of its existence and the process for complaining about judicial misconduct.

Our review indicates that significant changes are necessary to improve CJP's processes for investigating and disciplining judges and that some of these changes will require providing CJP with additional resources. Although we found that it has unrealized budget savings, CJP will also need a one-time budget allocation to begin implementing improvements to its operations. We estimate that the Legislature should provide CJP with \$419,000 in one-time funding to allow it to take the necessary actions of creating an investigations manager position and purchasing a new case management system that has the ability to accept electronic complaints. Further, as CJP works to address our other recommended improvements to its operations, it is likely to receive more complaints of judicial misconduct than it has in the past. For example, if CJP improves its public accessibility it will receive more complaints. Therefore, it will be critical for CJP to regularly assess its operations for efficiencies and communicate with the Legislature during the development of the State's budget each year to request any additional funding that it needs to adequately protect the public.

Summary of Recommendations

Legislature

The Legislature should propose and submit to voters an amendment to the California Constitution to reform CJP's structure and disciplinary proceedings so they are aligned with best practices and ensure that the public has a significant role in deciding judicial discipline.

To ensure that CJP makes critical improvements and has the resources to effectively investigate complaints and discipline judges for misconduct, the Legislature should provide it with a one-time budget increase of \$419,000 for fiscal year 2019–20.

CJP

To ensure that it adequately investigates alleged judicial misconduct, CJP should implement safeguards, such as requiring investigation strategies and management reviews.

To ensure that it identifies patterns that may indicate chronic judicial misconduct, CJP should create and implement procedures that require investigators to review all prior complaints when investigating a judge and determine if the prior complaints are similar to the current allegations.

To improve its transparency and accessibility, CJP should take steps to improve its public outreach, accept online complaints, and hold meetings that are open to the public.

Agency Comments

CJP agreed to implement the recommendations we made to it. It also stated it believes that its unitary structure comports with due process and has been approved by the Supreme Court of California.

Introduction

Background

Established in 1960 by an amendment to the California Constitution, the Commission on Judicial Performance (CJP) is responsible for investigating complaints about judicial misconduct and for disciplining judges who engage in misconduct.² CJP may also retire a judge for a disability that seriously interferes with the performance of the judge's duties. Its mission is to protect the public, enforce rigorous standards of judicial conduct, and maintain public confidence in the integrity and independence of the judicial system. CJP has jurisdiction over all judges of California's superior courts, the justices of the courts of appeal, and the justices of the Supreme Court of California (Supreme Court), and it can also impose certain discipline against former judges. CJP also shares jurisdiction with courts over subordinate judicial officers, such as court commissioners who may perform certain judicial duties. The focus of this audit is complaints against judges and former judges regarding judicial misconduct and how CJP handles those complaints. As Figure 1 on the following page shows, CJP consists of an 11-person commission and 22 staff members. Its fiscal year 2018–19 annual budget is \$5.2 million and its primary funding source is the State's General Fund. For fiscal years 2013–14 through 2017–18, CJP had an average balance of \$70,000 in unspent funding at the end of each fiscal year, ranging from just more than \$9,000 in fiscal year 2016–17 to nearly \$165,000 in fiscal year 2013–14. CJP is required to return these unspent funds to the State's General Fund.

CJP's Process for Reviewing Complaints

Judicial misconduct usually involves conduct that conflicts with the standards in the California Code of Judicial Ethics (ethics code). The ethics code sets high standards for conduct both on-the-bench and outside of the courtroom for judges and candidates for judicial office. For example, the ethics code addresses proper demeanor, the responsibility to diligently and impartially perform the duties of a judge, and the avoidance of activities that could undermine public confidence in the judiciary. The text box provides examples of types of judicial misconduct.

CJP cannot change a decision made by a judicial officer. When a judge issues a ruling that constitutes a legal mistake, also known as *legal error*, and that error changed the outcome of a case, only the appropriate reviewing court—rather than CJP—can change the ruling. Because a legal error by itself is not evidence of judicial misconduct, CJP will pursue complaints involving legal error only if complainants also allege some form of misconduct, such as bias or intentional disregard of the law.

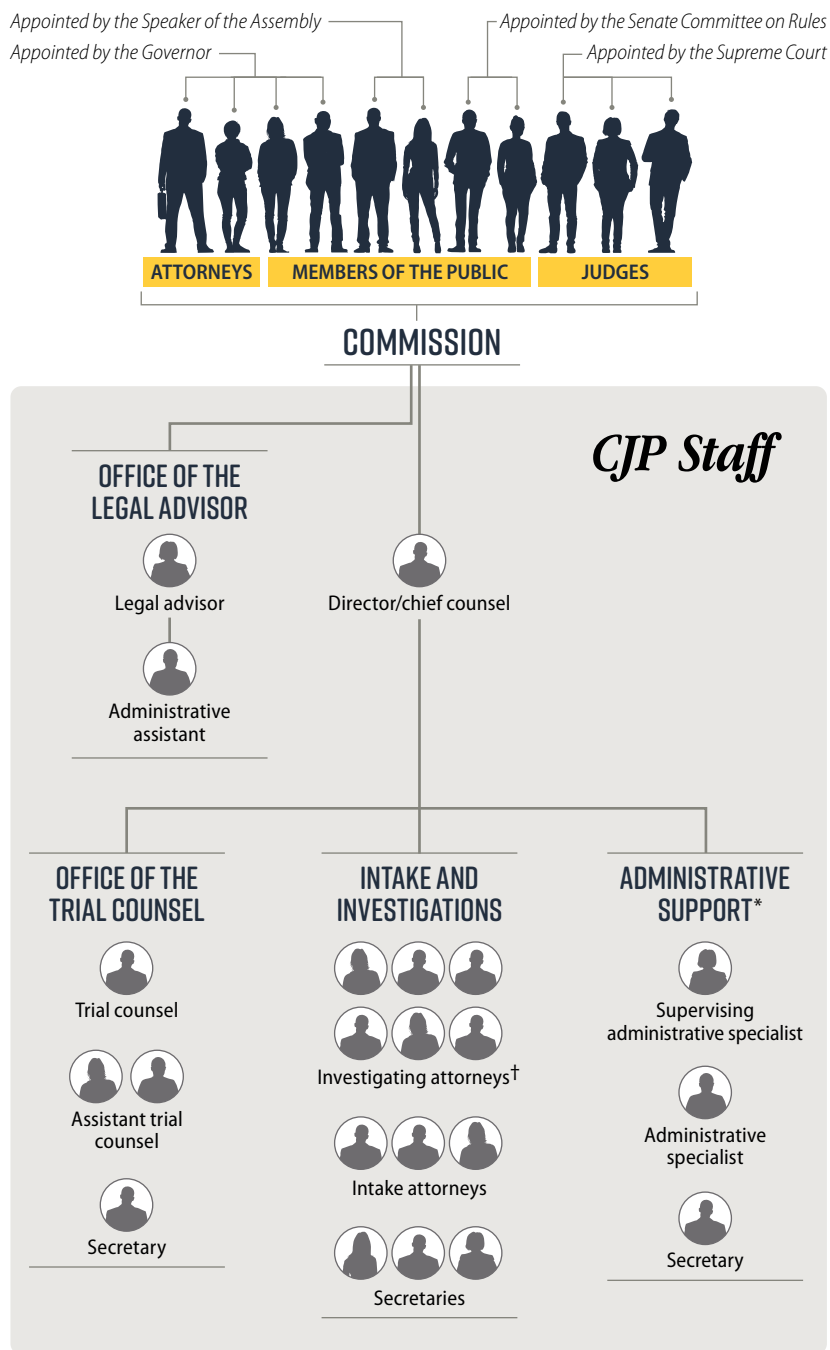
Selected Types of Judicial Misconduct

- Bias or the appearance of bias.
- Abuse of authority.
- Failing to disclose a conflict of interest.
- Improper communication about a case.
- Improper political activities.
- Substance or alcohol abuse.

Source: CJP data system files.

² CJP was formerly known as the Commission on Judicial Qualifications.

Figure 1
CJP Is a Small Agency Headed by an 11-Person Commission



Source: The California Constitution, CJP's organizational chart, and CJP's staff roster.

* CJP has a data systems manager position that was vacant for most of fiscal years 2013–14 through 2017–18.

† One investigating attorney oversees the intake attorneys.

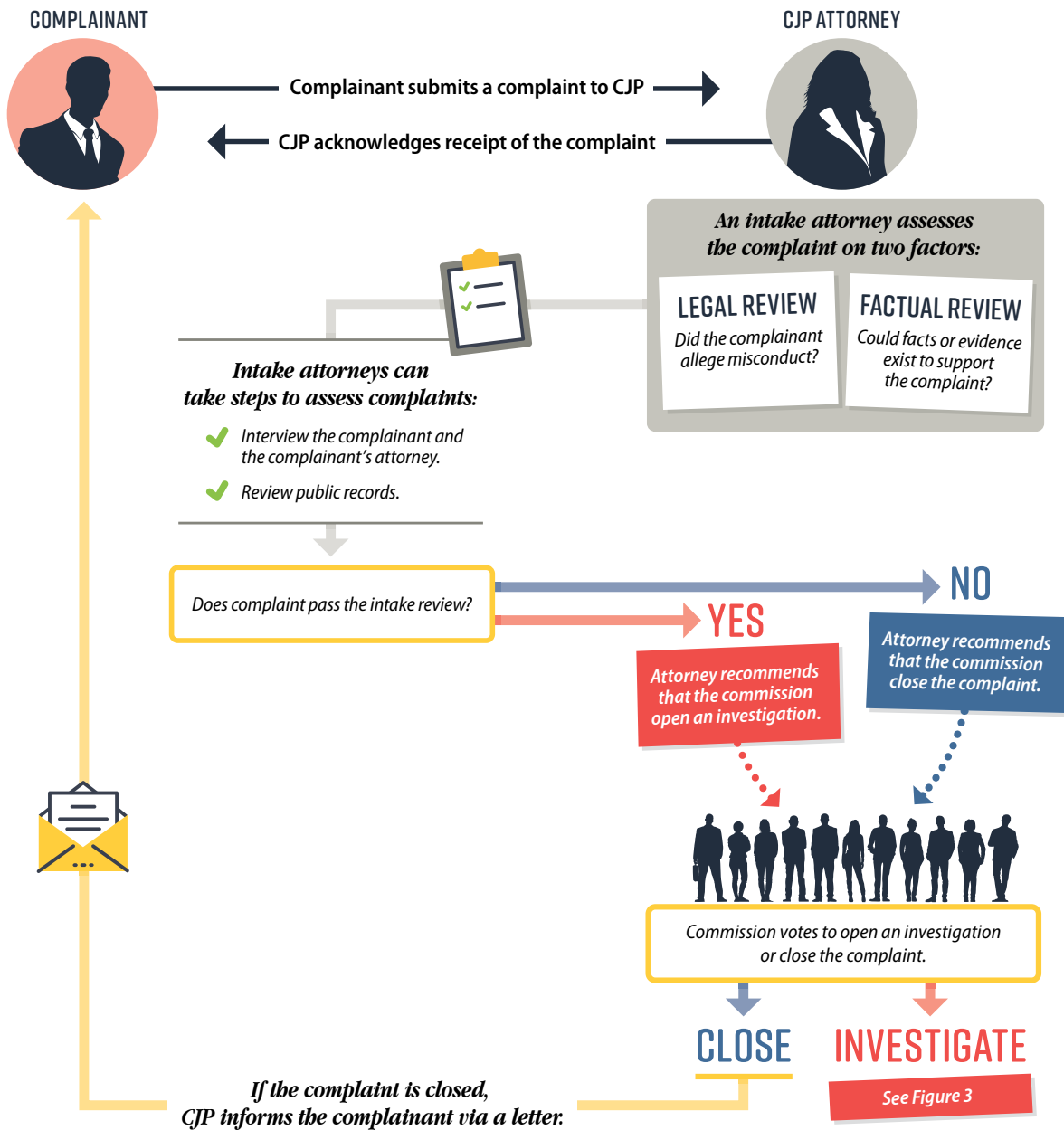
CJP's processes for addressing complaints and administering discipline are governed by its rules, which it is required to formally review every two years. CJP also has policy declarations—which detail the commission's policies, procedures, and practices—that it reviews periodically. CJP has internal manuals that further guide the day-to-day actions of its staff. Figure 2 on the following page shows the first stage of CJP's complaint review, which it refers to as *intake*. During intake, an attorney evaluates a complaint to determine whether it alleges judicial misconduct—which is called *legal review*—and if facts or evidence could exist to support the complaint—which is called *factual review*. The intake attorney recommends that the commission open an investigation if a complaint passes both the legal and factual reviews.³ If the complaint does not pass either one of these reviews, the intake attorney recommends that the commission close the complaint without investigation. After the commission considers the intake attorney's recommendation, it votes either to close the complaint without an investigation or to authorize an investigation.

When the commission authorizes an investigation, CJP's investigating attorneys (investigators) further explore the alleged misconduct and report the results to the commission, as we outline in Figure 3 on page 9. First, CJP investigators determine whether clear and convincing evidence exists that judicial misconduct occurred. *Clear and convincing* means that the evidence supports a conclusion that it is highly probable that the allegation is true. As Figure 4 on page 10 shows, clear and convincing is a relatively high standard of evidence. If the investigators conclude that no clear and convincing evidence of judicial misconduct exists, they recommend that the commission close the investigation. However, if the investigators find clear and convincing evidence of misconduct, they recommend a level of discipline, as we discuss on page 10.

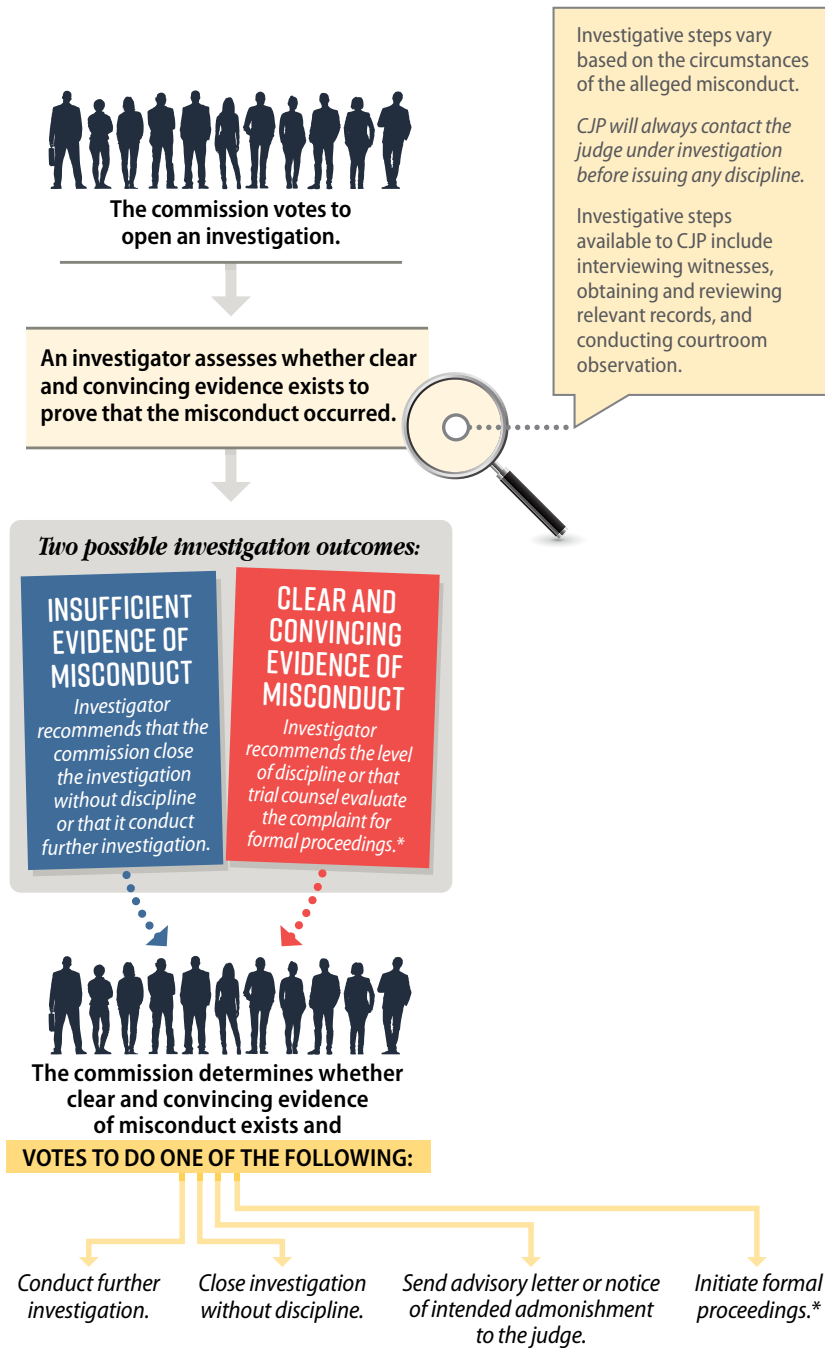
³ CJP conducts two types of investigations: *staff inquiries* and *preliminary investigations*. CJP considers staff inquiries to be less involved, and they can result in only one type of discipline: an advisory letter. However, the commission can vote to elevate a case that began as a staff inquiry to a preliminary investigation. For simplicity, in our report, we refer to both staff inquiries and preliminary investigations as *investigations*.

Figure 2

After Intake Attorneys Evaluate a Complaint, the Commission Votes on Whether to Open an Investigation



Source: Analysis of CJP's rules, its internal policies, and interviews with intake attorneys.

Figure 3**CJP's Staff Investigate Complaints and Make Disciplinary Recommendations to the Commission**

Source: Analysis of CJP's rules, its internal policies, and confidential minutes.

* The formal proceedings process involves an evidentiary hearing in which CJP's trial counsel and the judge's attorney present evidence in support of or against charges of misconduct. Figure 5 illustrates this process.

The Commission's Five Disciplinary Options

Private Discipline

- Advisory Letter
- Private admonishment

Public Discipline

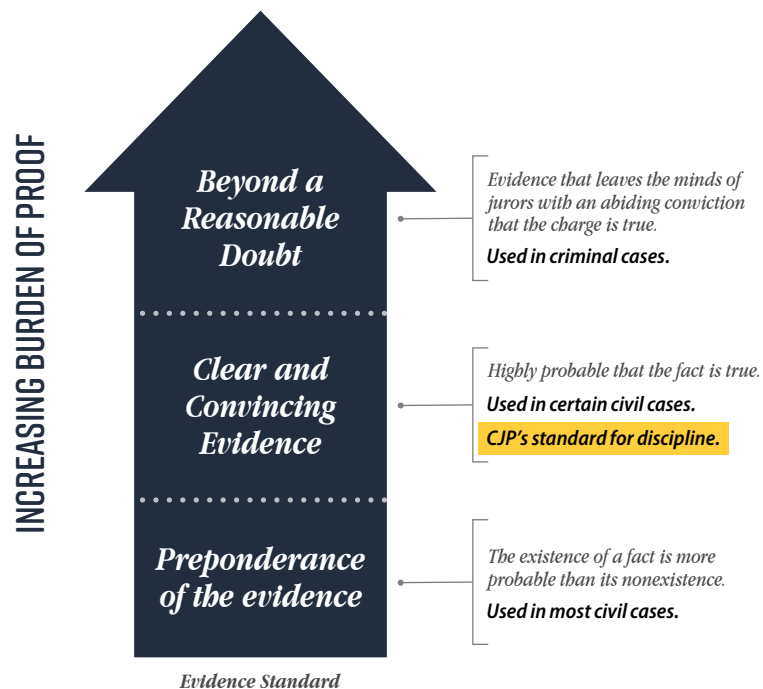
- Public admonishment
- Censure
- Removal

Source: CJP's rules and the California Constitution.

CJP's Process for Administering Discipline

If the commission determines clear and convincing evidence of misconduct exists, it must then decide on the level of appropriate discipline for that proven misconduct. The text box indicates the types of private and public discipline that the commission can vote to impose, all of which it communicates to the judge in writing. CJP posts records of public discipline to its website. In contrast, records of private discipline generally remain confidential, except, for example, following a formal request by an appointing authority such as the governor of any state or the President of the United States. CJP's five disciplinary options range from issuing advisory letters as the least severe discipline for relatively minor misconduct to removing judges from office for the most serious violations of the ethics code. The commission can consider a variety of factors beyond the severity of the proven misconduct when it decides which type of discipline to impose. These factors include a judge's length of service as a judicial officer, disciplinary history, and degree of appreciation of the seriousness of the misconduct.

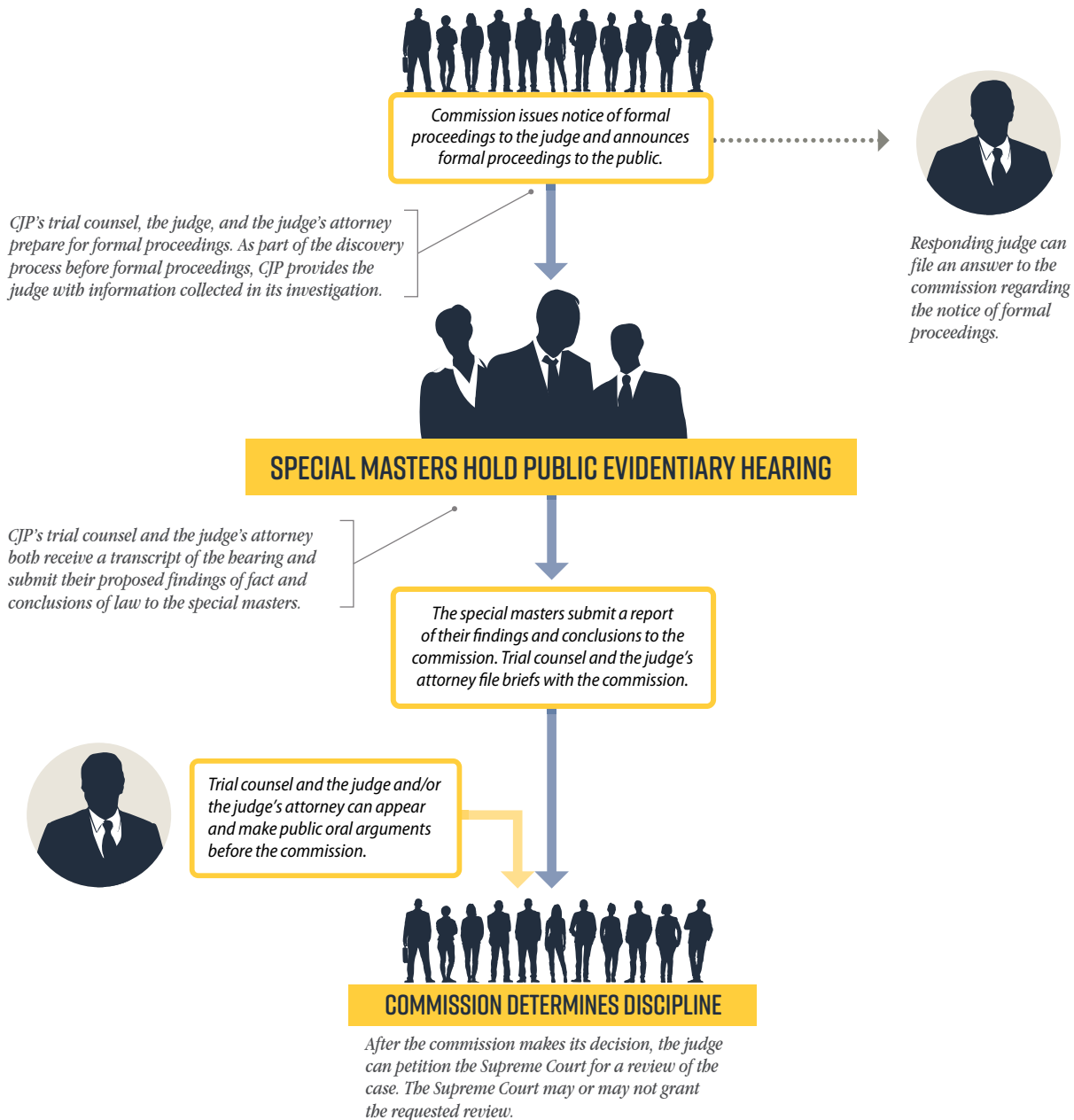
Figure 4
Clear and Convincing Evidence Is a Relatively High Burden of Proof



Source: California statutes, case law, and Judicial Council of California's criminal and civil jury instructions.

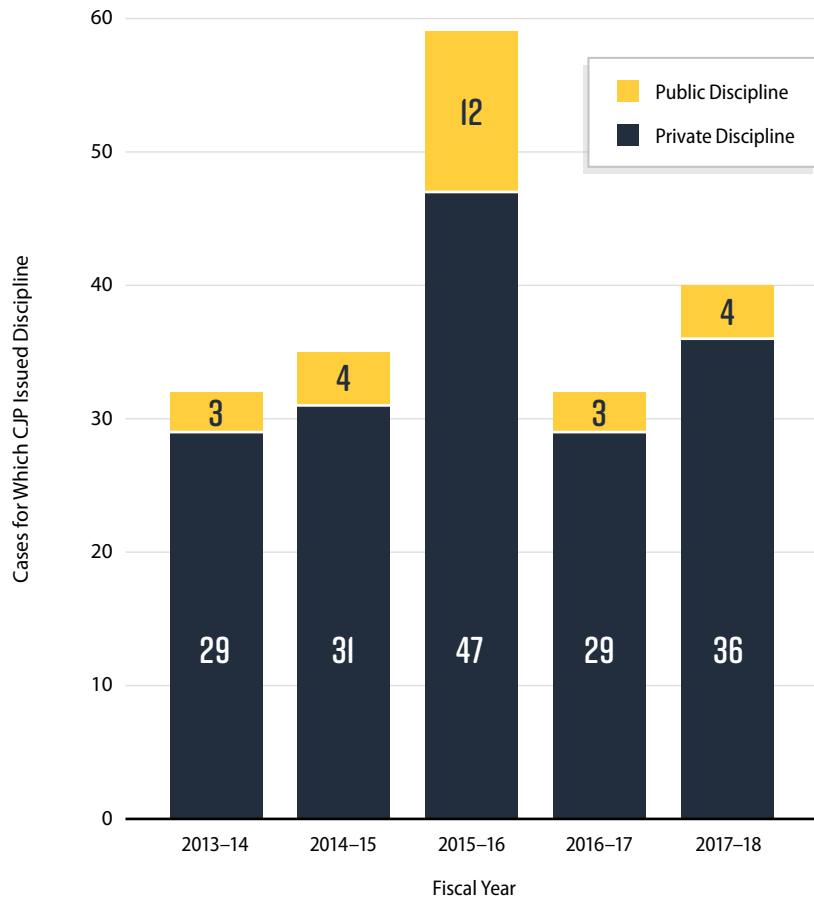
In a small number of cases, the commission will vote to begin formal proceedings before issuing discipline. The formal proceedings process involves a public trial—called an evidentiary hearing—in which CJP’s trial counsel and the judge’s attorney present evidence in support of or against the charges of misconduct. The commission initiates the formal proceedings process either because of the seriousness of the misconduct or because a judge demands it. As Figure 5 on the following page shows, a key portion of this process is the evidentiary hearing. This hearing is overseen by a panel of three special masters that the Supreme Court appoints from a pool of experienced judges who have received training to prepare them for CJP’s formal proceedings. The special masters apply the rules of evidence to determine what evidence is admissible in the proceedings and to ensure the proceedings adhere to the California Evidence Code. Their role is equivalent to the role of judges in other types of proceedings, such as criminal trials. After the evidentiary hearing, the commission receives a report from the special masters and briefs from trial counsel and the judge’s attorney. The special masters’ report contains their findings of fact (findings) and conclusions of law (conclusions) and the briefs from trial counsel and the judge’s attorney may include objections to the special masters’ report.

Most of the discipline that the commission issues is private, as we show in Figure 6 on page 13. CJP designed its private discipline options in part to correct problems early and in the hope that judges will not repeat or escalate the misconduct. Between fiscal years 2013–14 and 2017–18, the commission generally issued public discipline for judges who had previously received private discipline or who were first-time offenders but whose misconduct was very serious, such as violating the law. During the last five years, all but two of the judges who received public discipline had been the subjects of prior complaints, and nine had been the subjects of prior complaints that CJP closed without discipline. Further, 15 of the 26 judges—or 58 percent—who received public discipline had previously received private discipline. Three of the 26 judges received public discipline more than once.

Figure 5**Formal Proceedings Provide Judges Many Opportunities to Respond to the Commission's Charges of Misconduct**

Source: Analysis of the California Constitution and CJP's rules.

Figure 6
The Commission Primarily Issues Private Discipline



Source: Analysis of data from CJP's case management system.

Public Scrutiny of CJP

Members of the general public have at times over the last several decades expressed distrust of CJP, likely in part because CJP infrequently disciplines judges publicly and in part because of a perception that it operates without accountability. When Proposition 10 established CJP's predecessor in 1960, a state senator who supported the ballot initiative stated that although impeachment, recall, and defeat at the polls had succeeded in removing unethical judges, they had done so only in the rare instances in which judges' conduct had been "so reprehensible as to thoroughly arouse and excite public opinion." Nonetheless, by 1988 several news outlets described CJP as operating in secret because of its lack of transparency over the preceding 27 years.

In response to these concerns, the voters passed Proposition 92 in 1988, which imposed term limits on commissioners and allowed judges the opportunity to request formal proceedings be public. Only six years later, in 1994, news outlets again criticized CJP for being lenient with punishment and for a lack of transparency. That year, in an effort to increase the public's role in judicial discipline, California voters approved Proposition 190, which changed the commission's composition so that the majority are members of the public. More recently, judges and members of the public have again raised concerns about the judicial disciplinary process and CJP's transparency. Those concerns were the genesis of this audit, which is the first external review of the operations of the CJP in its nearly 60-year history.

Chapter 1

FLAWS IN CJP'S INTAKE AND INVESTIGATION PROCESSES COULD ALLOW JUDICIAL MISCONDUCT TO CONTINUE

Chapter Summary

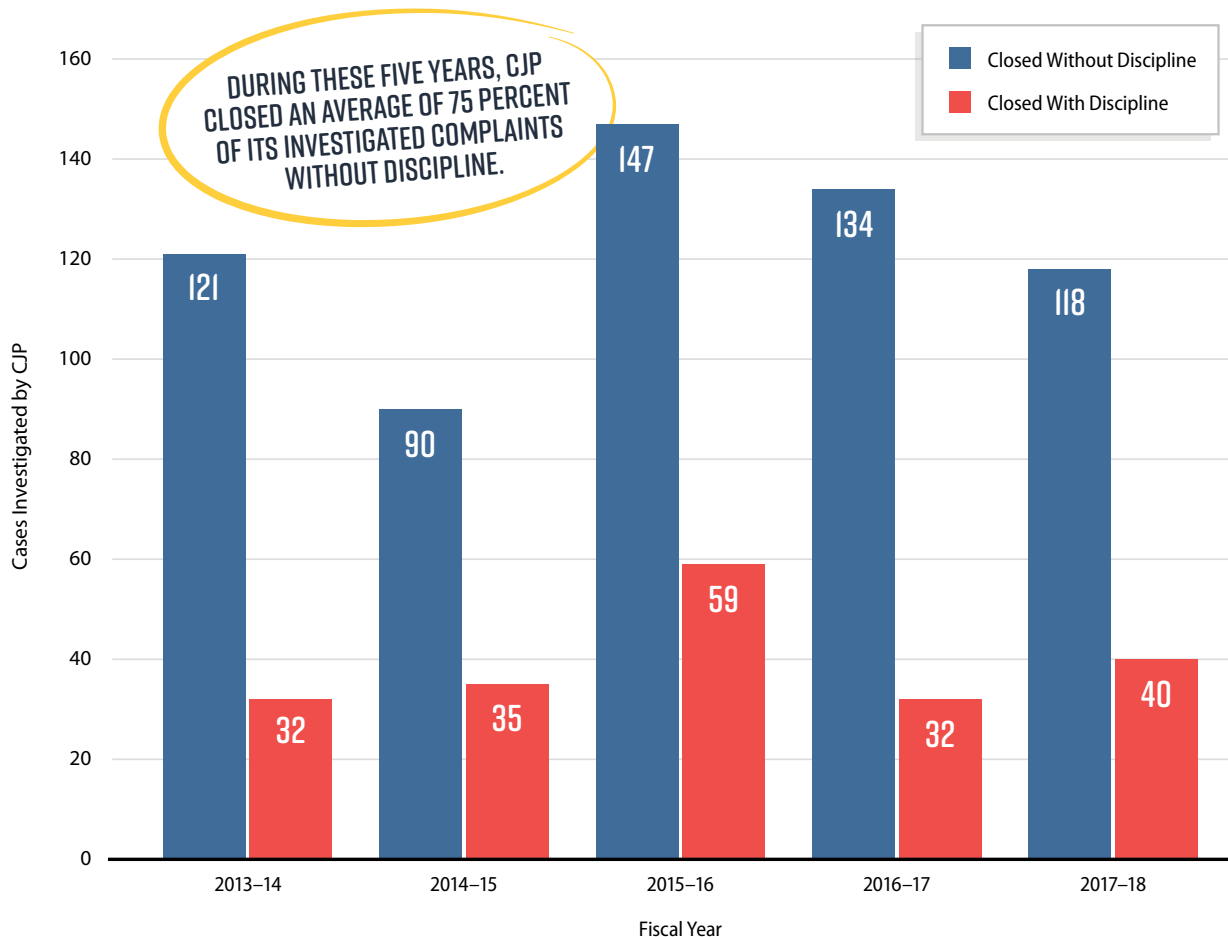
Although adequately investigating complaints is critical to detecting and ending judicial misconduct, CJP's investigators have failed to pursue allegations thoroughly and ignored warning signs of ongoing misconduct. In about one-third of the 30 cases we reviewed, investigators did not take all reasonable steps—such as speaking to critical witnesses or reviewing pertinent records—that could have helped CJP determine the existence and extent of the alleged misconduct. In three cases, CJP did not identify indications of potential long-running misconduct—the filing of several similar complaints about the same judge—in either its intake or its investigative stages. Although CJP generally followed a reasonable process for reviewing new complaints, its intake attorneys did not identify patterns of allegations against specific judges because CJP has not established a formal process to monitor for such trends. Similarly, its investigators did not adequately consider trends in prior complaints against specific judges, and consequently they did not seek approval from the commission to expand their investigations to determine whether larger problems existed. The weaknesses we observed in CJP's investigations are likely due in part to its lack of key safeguards for ensuring high quality investigations, such as documented investigation strategies and adequate managerial oversight.

In About One-Third of the Cases We Reviewed, CJP's Investigators Did Not Take All Reasonable Steps to Determine the Existence or Extent of Alleged Misconduct

As the Introduction describes, if a complaint advances past the intake phase, CJP charges its investigators with determining whether judicial misconduct occurred and recommending that the commission either issue discipline or close the case. A team of six investigators conducts all CJP investigations. Pursuant to a 1973 Supreme Court decision, the commission can impose discipline only if there is clear and convincing evidence of judicial misconduct. In other words, CJP must demonstrate that a finding has a high probability of being true. The frequency with which the commission agrees with its investigators' recommendations heightens the importance of their work being thorough. From fiscal years 2013–14 through 2017–18, the commission agreed with more

than 70 percent of the discipline recommendations its staff made. As Figure 7 shows, CJP closed 75 percent of its investigated cases without discipline.

Figure 7
CJP Closes Most Cases That It Investigates Without Issuing Discipline



Source: Analysis of data from CJP's case management system.

After reviewing 30 investigations that CJP concluded during our five-year audit period, we determined that it did not take all reasonable steps to determine the existence or extent of alleged misconduct in 11 investigations. Once the commission approves an investigation—the frequency of which we discuss later in this chapter—investigators have wide latitude to take the actions needed to evaluate potential misconduct. According to the director-chief counsel (director), investigators may speak with court staff, attorneys who practice before the judge, litigants, or the judge's peers, as

well as observe court proceedings. They may also review many types of records, including court files, files from other government agencies, and phone and email records. State law requires other public entities to cooperate with and give reasonable assistance and information to CJP in connection with any investigation. State law also authorizes CJP to issue subpoenas to obtain records or witness testimony that is relevant to any investigation. However, as Figure 8 shows, investigators did not thoroughly investigate 11—or about one-third—of the cases we examined, even though these investigations involved serious allegations.

Figure 8
CJP Did Not Thoroughly Investigate About One-Third of the Complaints We Reviewed



Source: Analysis of CJP investigative files, memos, and original complaints.

Note: Of the 11 cases not thoroughly investigated, six were closed without discipline and five resulted in private discipline.

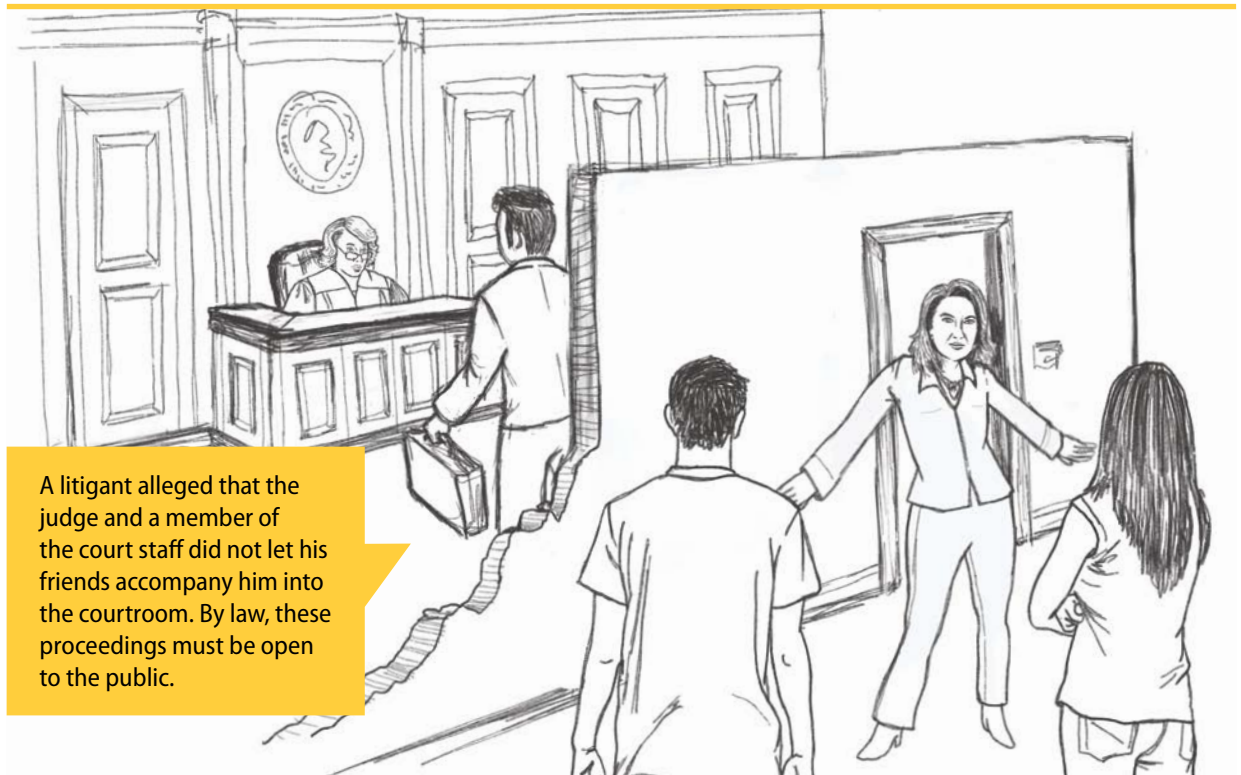
In some of these 11 investigations, CJP did not take investigative steps that would have increased the likelihood that it could identify whether judicial misconduct occurred. One such investigation involved an allegation that a judge and a member of the court

An investigator did not successfully execute all reasonable actions during an investigation, resulting in a higher risk that if the alleged misconduct occurred, it did so without detection.

staff restricted public access to a proceeding, which can be a violation of the law. Figure 9 illustrates the actions the investigator took to evaluate this allegation and the key steps he did not take. Ultimately, the commission closed the case without discipline. When we discussed the missed steps with the investigator, he expressed his belief that certain steps would not add value to the investigation, as well as his concern about the time and costs associated with courtroom observation. Because the investigator did not successfully execute all reasonable actions during his investigation, the risk is higher that if the alleged misconduct occurred—in this case, improperly barring the public from open proceedings—it did so without detection.

In another example of an inadequate investigation—involving some of the most egregious alleged misconduct among the investigations we reviewed—CJP did not take a key step to determine the extent of a judge's misconduct. During this investigation, which involved a high number of allegations, the investigator learned that the judge allegedly made many aggressive and intimidating comments while on the bench. The investigator was told these comments may have crossed the line into criminal behavior. Court reporters told the investigator that they had some audio recordings of the judge's proceedings, that they thought they remembered the judge making inappropriate comments, and that they would attempt to listen to the audio to find examples of the judge's comments. However, according to the investigator, the court reporters later advised her that finding relevant audio recordings to identify specific improper comments was an onerous task, and they refused to do it. At that point, the investigator could have requested that the court reporters voluntarily provide her with audio files from proceedings before this judge so that CJP could listen to them. Instead, the investigator never requested the audio files.

When we asked the investigator why she did not request audio files that might have substantiated some of the allegations, she explained that she believed at the time that the high number and strength of the witness testimony she had collected would be sufficient to meet the clear and convincing standard for proving misconduct. She also expressed her concern that processing all of the court reporters' audio recordings would be time-consuming. However, she acknowledged that CJP could have brought in additional staff to assist. According to assistant trial counsel, CJP successfully used a similar approach in another investigation when it obtained and reviewed audio of a judge's inappropriate behavior that a court had recorded.

Figure 9**CJP Missed Key Steps in Its Investigation of a Judge's Alleged Misconduct****DURING CJP'S INVESTIGATION, IT ...**

Interviewed the complainant, who repeated the allegation.



Interviewed one of the friends, who corroborated the allegation, and attempted to interview the second friend.



Requested comment from the judge, who stated that she had not improperly denied entry to her courtroom.

CJP DID NOT ...

Interview court staff who had allegedly barred entry. Instead, CJP accepted a statement provided by the staff as part of the judge's response to the allegations.



Determine whether video evidence was available from security cameras.



Observe the judge presiding over similar proceedings. CJP did send an investigator to attempt this step, but only after it alerted the judge it was conducting an investigation. Moreover, no similar proceedings were before the judge on the days that the investigator visited the court.

Source: Analysis of a CJP investigation file.

Note: We changed the gender of some of the parties to protect the confidentiality of the investigation.

Using court transcripts and witness testimony as evidence, the commission ultimately disciplined the judge for some of these comments, but it closed several other allegations. However, trial counsel staff also did not request that the court reporters provide audio recordings. When we asked the assistant trial counsel who worked on the case why CJP did not request a selection of recordings, he was not sure whether CJP had asked for audio recordings or whether audio recordings even existed. CJP's director stated that he was not certain whether CJP could use its subpoena authority to obtain audio recordings from court reporters due to the legal protections around court reporter records, which make them different from audio recorded directly by a court. However, according to guidance from the Court Reporters Board of California, court reporters have discretion to provide their audio recordings to attorneys or involved parties. Moreover, state law also requires court staff to provide reasonable assistance to CJP investigations. The assistant trial counsel stated that this requirement would likely encompass court reporters. By leaving these issues unresolved and not requesting a selection of audio recordings, CJP left the extent of the misconduct undetermined.

In another example, CJP investigators confirmed that the judge had improperly delegated judicial authority by allowing court staff to perform certain duties. However, despite the fact that CJP visited the court more than once, investigators never interviewed the court staff who were involved in this improper practice. These staff might have provided valuable insight on the judge's involvement with the practice and its history. When CJP asked the judge about the improper delegation, the judge provided an initial explanation for the practice. CJP then notified the judge that the practice was improper and that it was considering issuing a private admonishment, which is a higher level of discipline than an advisory letter. In response, the judge provided a second explanation for the practice that contradicted the first. The commission ultimately issued an advisory letter. Nevertheless, because the investigators did not speak with the court staff, they could not give the commission any information those staff may have been able to provide, which might have aided the commission when it assessed the judge's changing explanations.

The steps CJP investigators do or do not take can affect the disciplinary decisions that the commission can make.

The steps investigators do or do not take can affect the disciplinary decisions that the commission can make. We did not reweigh evidence in these cases or second-guess the propriety of the commission's determinations based on the facts that the investigators presented to it. However, missed investigative steps like those we discuss in this section leave unanswered questions about the existence or extent of misconduct. These unanswered

questions can have a direct, negative effect on the commission's ability to issue appropriate discipline because doing so requires that its staff find clear and convincing evidence of misconduct.


CJP's investigators generally shared their perspective that the investigative techniques that we believed were reasonable would not have benefited the investigations. We disagree. The investigators used many of these same investigative techniques—such as reviewing video and audio recordings and interviewing court staff—in other investigations, and the steps proved to be beneficial. Therefore, we believe that these steps were worth taking.

Some courts' lack of transcripts and recordings could also potentially hinder CJP's ability to prove misconduct with clear and convincing evidence. Our review of four superior courts found that the availability of official court reporters and electronic courtroom recordings varied by county and by the type of court case, as Table 1 on the following page shows. The four courts we reviewed each asserted that they provide some court reporter or courtroom recording services, with Los Angeles, Sacramento, and San Francisco superior courts providing these services for a variety of case types. In contrast, Glenn Superior Court asserted that it provides court reporters in only four case types. Because the availability of court reporters and electronic recordings for case types differ, CJP might not be able to obtain transcripts or electronic recordings for certain cases, depending on a local court's practices.

Among the 16 investigations we reviewed in which transcripts or recordings would have helped to prove or disprove misconduct, a lack of transcripts or recordings hindered CJP's ability to obtain clear and convincing evidence of judicial misconduct in three instances. According to the supervising administrative specialist, CJP has not comprehensively tracked in its case management system the cases in which transcripts or recordings were unavailable, impeding it from being able to demonstrate that a lack of transcripts is a widespread problem. In 2012 CJP sent a letter to the Legislature, the Governor, and the Chief Justice of the Supreme Court expressing concern that many courts were responding to budget cuts by eliminating court reporter services. Additionally, in 2016 CJP's former director testified before an Assembly Budget Subcommittee that very often CJP could not meet its clear and convincing standard of evidence for proving misconduct because of a lack of court recordings and transcripts. If CJP believes the absence of court transcripts or recordings regularly impedes its ability to conduct investigations, it should expand its efforts to inform policymakers that increased use of transcripts and recordings in California court proceedings would improve its ability to fulfill its mission.

CJP should expand its efforts to inform policymakers that increased use of transcripts and recordings in California court proceedings would improve its ability to fulfill its mission.

Table 1
Each of the Superior Courts We Reviewed Uses Court Reporters and Recordings Differently

CASE TYPE	SACRAMENTO	LOS ANGELES	SAN FRANCISCO	GLENN
<i>Criminal felony</i>				
<i>Criminal misdemeanor</i>	 			 *
<i>Unlimited civil</i> [†]				
<i>Limited civil</i> [†]				
<i>Juvenile</i>				
<i>Family</i>	 ‡		 §	 *
<i>Criminal infraction</i>				
<i>Probate</i>				
<i>Traffic</i>				
<i>Unlawful detainer</i>				
<i>Small claims</i>				



Indicates presence of court reporter



Indicates use of electronic courtroom recording

Source: Interviews with staff at all four courts and analysis of Los Angeles Superior Court's policies and procedures.

* Glenn Superior Court stated it only provides court reporters for certain cases of this type.

† If courts allow parties to pay for private court reporters in civil cases, then courts must provide an official court reporter for indigent litigants.

‡ Sacramento Superior Court has four court reporters who it assigns to family court cases with the highest likelihood of appeal.

§ San Francisco Superior Court stated that it provides court reporters for these case types only when they deal with a high volume of consecutive hearings.

In Both Its Intake and Investigative Stages, CJP Failed to Detect Warning Signs of Ongoing Misconduct

CJP's intake and investigative processes did not always consider trends in the complaints about specific judges, hindering CJP's ability to detect and deter chronic judicial misconduct. Although attorneys at the intake phase evaluate the facts and evidence that individual complainants provide, they do not always consider whether other complainants had filed similar allegations about the specific judges in question. Further, CJP has not established a process for intake attorneys to advise the commission on when to use its oversight authority to investigate potential chronic misconduct. We found similar problems with CJP's investigative phase: after reviewing investigations of judges with long histories of similar complaints, we found that it missed opportunities to expand the scope of investigations to determine if misconduct was representative of a larger, ongoing problem. CJP's failure to take proactive steps to identify chronic misconduct increases the risk that it will fall short in its duty to protect the public.

CJP's failure to take proactive steps to identify chronic misconduct increases the risk that it will fall short in its duty to protect the public.

Although CJP's Intake Process Is Reasonable, It Does Not Identify Patterns of Complaints Related to Specific Judges

The fact that CJP investigates a small percentage of the complaints it receives has caused concern. However, we found that CJP has established a reasonable intake process for addressing individual complaints and that its intake attorneys have generally followed that process. As we describe in the Introduction, CJP requires that its intake attorneys assess complaints across two different factors: a legal review and a factual review. For an intake attorney to recommend that the commission open an investigation, the legal review must reveal that the complainant has alleged misconduct and the factual review must determine that facts or evidence could exist to warrant an investigation. Similar to investigations, the frequency with which the commission agrees with its intake attorneys' recommendations to close cases before conducting investigations shows the importance of the work they perform. In fact, during meetings CJP held from fiscal years 2013–14 through 2017–18, the commission only disagreed with the intake attorney's recommendation to close a complaint without investigation in 11 of about 5,100 instances. During this same period, CJP closed at intake about 85 percent of the almost 6,000 complaints it closed.

We reviewed 40 complaints that CJP closed without investigation after its review at the intake stage from fiscal years 2013–14 through 2017–18. Legal and factual reviews in these cases were often intertwined. For example, CJP's ability to determine a fact—

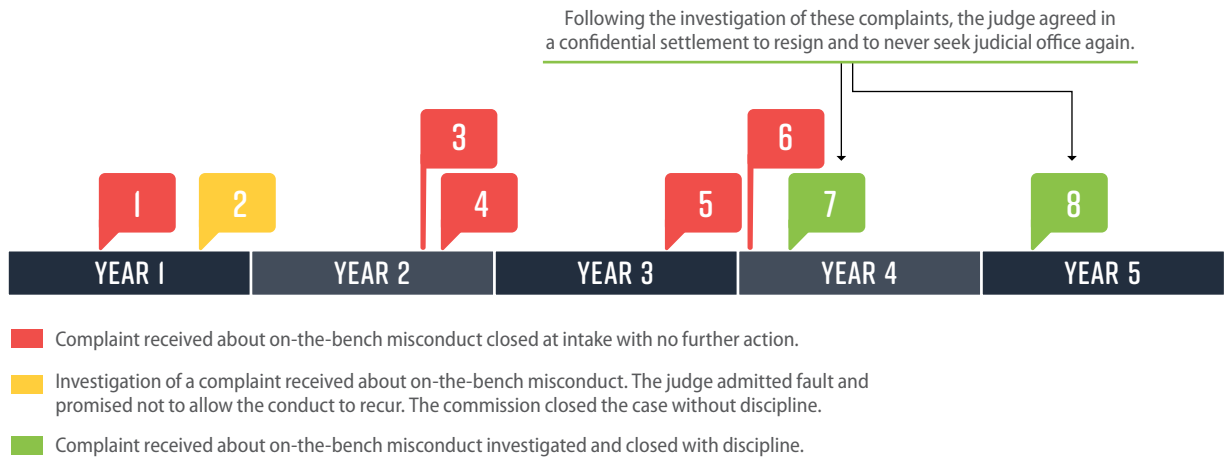
such as the type of hearing in which a judge allegedly made a comment—can affect its ability to determine whether the alleged behavior would be misconduct under the ethics code. In other words, the context for alleged behavior can be important to CJP's assessment of complaints at intake. Sometimes the absence of potentially relevant facts means that intake attorneys do not forward complaints to the commission with a recommendation to investigate the complaint. The manner in which CJP keeps its records made it difficult for us to determine with precision how many complaints the commission did not forward to investigation specifically because the complaints failed the legal or factual review. However, we do not have concerns about CJP's record keeping because these two analyses are often interconnected. Additionally, we were able to determine the reasons intake attorneys recommended the commission close complaints by reviewing the memos they sent to the commission and discussing the complaints with the attorneys.

Thorough factual review often requires that intake attorneys take steps beyond reading the original complaint and its attached materials. Additional fact checking steps help the attorneys answer questions regarding complainants' allegations before making recommendations to the commission. We found that the intake attorneys performed these additional steps in about half of the 40 complaints we reviewed. However, additional steps are sometimes unnecessary. For example, attorneys do not need to complete additional factual review steps when a complainant makes an allegation that does not constitute misconduct or sends CJP supporting documents that do not corroborate the allegation.

However, we are concerned that CJP's intake process does not identify patterns of complaints that—taken in the aggregate—could point to potential judicial misconduct that it could investigate under its oversight authority, which empowers it to initiate investigations as it deems necessary. In one particularly concerning example, CJP's failure to identify patterns of allegations allowed a judge who was the subject of many similar complaints of serious on-the-bench misconduct to avoid discipline for years. Figure 10 provides a timeline of the relevant complaint history for this judge. CJP did not open investigations into many of these complaints because it concluded the allegations either did not constitute misconduct or were unlikely to be provable. During the investigation of one early complaint it did investigate, the judge admitted to improper behavior and promised not to repeat the behavior. The commission closed the case without discipline. The last complainant alleged that the judge had again engaged in similar behavior and supported his allegations with transcripts. CJP opened an investigation, and the judge offered to resign and agreed in a confidential settlement to never again serve in a judicial capacity.

CJP's failure to identify patterns of allegations allowed a judge who was the subject of many similar complaints of serious on-the-bench misconduct to avoid discipline for years.

Figure 10
Despite Numerous Complaints About a Judge’s Actions, CJP Did Not Detect a Pattern of Misconduct



Source: Analysis of CJP case files, complaints, and database.

Note: This timeline includes only complaints that we determined to be related to the type of misconduct for which CJP eventually disciplined the judge. CJP received additional complaints about this judge during the same time period, but those complaints alleged different types of misconduct or did not allege misconduct.

Although the final investigation ended with the judge leaving the bench, the fact that CJP did not detect a pattern of inappropriate activity earlier in this five-year period raises concerns about how it approaches its oversight of judicial misconduct. The last complainant attached transcripts to the complaint that were instrumental in proving misconduct occurred. In other words, CJP had no challenges meeting the factual analysis portion of the intake evaluation and did not need to perform an extensive investigation. However, had the complainant not provided these transcripts, it is not clear whether CJP would have opened an investigation into the related allegations or once again closed the matter at intake as it had with some of the previous complaints. Upon reviewing the pattern of complaints, one of CJP’s assistant trial counsels—who is among its most senior attorneys—agreed that the allegations in two of the past complaints warranted more thorough investigations. CJP’s current process does not require intake attorneys to review past complaints for patterns of misconduct, unless they are recommending the commission open an investigation.

Further, at intake, CJP’s data do not allow it to identify patterns of complaints related to judges’ legal errors. As the Introduction describes, legal errors are rulings that constitute legal mistakes. Legal errors that changed the outcome of a case must be resolved by a reviewing court. The Supreme Court has ruled that mere legal error is not sufficient to find that a judge violated the ethics code. However, CJP’s rules indicate that legal error paired

Because of its data entry practices, CJP cannot generate a report of all judges about whom it has received complaints of legal error.

with a violation of the ethics code—such as bias—is subject to investigation and discipline. Analyzing data on complaints about legal error during intake could help CJP identify additional factors that might constitute misconduct and warrant an investigation. For example, the director of the state of Washington’s judicial conduct commission stated that Washington reviews a judge’s complaint history to determine whether a judge has committed a pattern of legal error that infringes on basic rights. Additionally, analyzing complaints could reveal whether a judge consistently commits legal error in cases involving litigants of a certain protected class of people, which could indicate bias. Analysis of complaint data in this manner would be consistent with the Supreme Court’s observation that a judge may commit acts that lead to violations of the ethics code through repeated legal error. As an example, the Supreme Court indicated that a judge who repeatedly dismisses certain claims might be subject to discipline if the dismissals are shown to be not only legally erroneous, but also based on bias, prejudice, or some other improper purpose.

However, CJP lacks the data it needs to identify these patterns. Specifically, because of its data entry practices, CJP cannot generate a report of all judges about whom it has received complaints of legal error. CJP’s intake manager told us that when it closes a complaint at intake, an attorney would likely use an allegation code that documents a complainant’s dissatisfaction with a judicial act if at least one of the allegations concerns legal error. However, she also explained that attorneys use this same code for matters in which the complainant does not allege any legal error. In fact, CJP applied this code to about 5,400 of the more than 7,400 unique complaints it closed—or 73 percent—from fiscal years 2013–14 through 2017–18. We found this approach particularly concerning because CJP has five other allegation codes that more specifically relate to legal error, which it used for just over 150 complaints that it closed during the period we reviewed. In our review of 25 complaints indicating legal error, we were unable to identify any patterns of misconduct by specific judges. However, CJP’s imprecise data limited our analysis and will limit CJP’s ability to perform analyses as well, because it cannot identify all complaints related to legal error.

Ultimately, the commission will likely need to use its oversight authority—its ability to open investigations that do not stem from a single complaint—if it wishes to open investigations when it identifies patterns of potential misconduct. Currently, CJP’s procedures state that it will use its oversight authority to investigate matters that it learns about from anonymous complaints, from its commissioners, from news articles, from appellate decisions, or from its work on other cases. To better leverage its oversight authority so that it can address patterns of misconduct, CJP would

need to define when trends in complaints constitute possible misconduct and direct its intake attorneys to recommend oversight investigations under those circumstances.

CJP's Narrow View of Investigations Stopped It From Identifying Potentially Chronic Misconduct

We observed that CJP investigators sometimes took a narrow view of their investigations. Consequently, they did not always consider the broader histories of allegations against judges when determining how to conduct their investigations and whether to recommend that the commission impose discipline. When we reviewed 30 investigations, we identified two in which patterns of previous complaints about the judges in question suggested that the alleged misconduct might have been chronic. We believe that both of these cases warranted investigations that were broader in scope than the investigations CJP conducted.

In the first case, CJP received 12 complaints about the judge's demeanor and bias on the bench over the course of fewer than 10 years. However, it did not take steps to investigate the complaints as a pattern. The investigation we selected for our review involved the fifth complaint that CJP received regarding this judge about these types of misconduct. This complaint alleged that the judge had displayed poor demeanor and showed favoritism during a court proceeding. CJP staff spoke with the complainant and a witness before the investigator determined that he could not prove the allegations contained in that specific complaint. The commission closed the complaint without issuing discipline.

According to the investigator, he could have expanded the scope of his review so that he could determine whether a systemic problem with the judge's behavior existed. He stated that he could have employed techniques—such as interviewing a selection of attorneys who routinely practice before the judge or interviewing court staff—that CJP's investigations manual suggests for investigating patterns of misconduct. Because of the time that elapsed since the investigation, the investigator for this case did not recall why he chose not to expand the scope of his investigation, but he also stated that he nevertheless believed it was reasonable for him to conduct his investigation in the manner in which he did. We find this perspective puzzling, given that CJP received two additional complaints about related behavior about the same judge while CJP was reviewing this complaint. One of these complaints alleged that the judge behaved in an almost identical manner as was alleged in the case being reviewed. In the three years following the commission closing this investigation, CJP received five additional complaints about the same judge's demeanor or bias.

CJP received 12 complaints about a judge's demeanor and bias on the bench over the course of fewer than 10 years. However, it did not take steps to investigate the complaints as a pattern.

In the second case, shortcomings in the investigation stopped CJP from being able to determine whether the misconduct had reoccurred. The commission had privately disciplined the judge in question three times for inappropriate remarks. During the period we reviewed, CJP received another complaint about the judge making improper remarks—which at the time was the eighth complaint it had received over a 12 year period that alleged the judge displayed poor demeanor. The commission opened an investigation. Despite the judge’s history of prior complaints and discipline, the assigned investigator ended her investigation after she determined that there was not a transcript of the relevant proceeding and that witnesses could not corroborate the misconduct alleged in that specific complaint. However, she could have conducted courtroom observation—which CJP had used in a previous instance to discipline the same judge—to attempt to determine whether misconduct was reoccurring. The commission closed this case without issuing discipline.

Given the history of discipline and similar complaints, we believe the investigator missed an opportunity to determine whether a broader pattern of misconduct existed. The investigator stated that there are generally no transcripts for proceedings before this judge—a situation she described as a conundrum. However, this situation means that the investigator’s approach to proving misconduct was unlikely to ever result in clear and convincing evidence. In light of that fact, we believe that the investigator should have recognized the broader context of the judge’s history of complaints and discipline and taken additional steps as necessary to determine if misconduct had occurred.

The director generally agreed that it was possible to do more investigative work in many cases.

The director generally agreed that it was possible to do more investigative work in many cases. However, he asserted that investigators might have had reasons for not continuing investigations, including that their knowledge and experience led them to believe that additional investigative work would not yield better evidence of misconduct. He also suggested that because investigative resources are finite, devoting time to one case is a mistake if the time would be better spent on other cases. Notwithstanding the director’s perspective, we believe that CJP’s records for the judges in these two cases should have indicated to investigators the need to pursue broader investigations. Further, as we discuss later in this chapter, CJP’s investigators did not prepare any investigative strategies for the cases we reviewed and had no established timelines for how long investigations should last. In the absence of these steps, we question whether CJP could have made fully informed, resource-based decisions to end these investigations.

By updating its procedures, taking a more comprehensive approach to its investigations, and leveraging all available information from past complaints, CJP could better investigate and detect judicial misconduct. As the preamble to the ethics code describes, our legal system is based on the principle that an independent, fair, and competent judiciary will interpret and apply the law. The ethics code seeks to ensure such a judiciary by establishing standards for judges' ethical conduct. Therefore, CJP's role as the sole agency responsible for investigating alleged violations of the ethics code is essential to upholding the integrity of the judiciary and public confidence in the judicial system. When it does not conduct adequate investigations, CJP falls short of its fundamental charge.

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CJP Has Not Established the Safeguards Necessary to Ensure Effective Investigations

CJP must improve its internal safeguards to ensure that investigators do not omit valuable steps in the investigative process. For example, both best practices and CJP's internal procedure manual suggest that before commencing investigations, investigators should prepare their planned strategy for each case. According to the Council of Inspectors General on Integrity and Efficiency's *Quality Standards for Investigations*, an investigator should establish case-specific priorities and objectives in an investigation plan as soon as possible after the investigation's initiation.⁴ Similarly, best practice advice presented at an American Bar Association conference in 2013 recommended that an investigator prepare a preliminary investigation plan to document an internal investigation's objectives and preliminary timeline.⁵ CJP acknowledges the benefit of these types of plans in its investigation manual, which states that an investigator should outline an investigative strategy as soon as possible after receiving a case and that documenting this strategy in a memo is helpful.

However, CJP's investigators could not demonstrate that they prepared strategies for any of the 30 cases we reviewed. When we asked investigators why this was the case, we received a variety of responses. One investigator told us that she viewed one of her investigations as generally straightforward; therefore, a strategy was unnecessary and not a good use of her time. Another investigator told us that she uses other techniques to decide how to approach her investigations, such as reviewing the witnesses and documents that are mentioned in the intake attorneys' assessments

⁴ The Council of Inspectors General on Integrity and Efficiency is an independent federal entity charged in part with increasing the effectiveness of federal Offices of the Inspectors General.

⁵ The American Bar Association is the national representative of the legal profession, and it provides expert guidance and training to legal professionals.

For the 30 investigations we reviewed, the time between when the commission authorized an investigation and when the investigator made a final recommendation to the commission averaged 10 months.

of the complaints. However, the number of cases in which investigators failed to perform valuable steps, such as interviewing witnesses, suggests that they would benefit from spending additional time planning their approaches.

CJP also has not established any formal timelines for its investigations, which may have contributed to the wide variation in the time it spent investigating cases. For the 30 investigations we reviewed, the time between when the commission authorized an investigation and when the investigator made a final recommendation to the commission ranged from about two months to almost three years, with an average of 10 months. The director explained that a number of factors could affect the timeline of an investigation, such as whether CJP needed to wait for a court case to conclude or for the ruling of an appellate court. Further, in the cases we reviewed, the commission almost always granted judges' requests for extensions of time to submit their responses to allegations. Although some delays in investigations may be unavoidable, requiring investigators to develop estimated timelines as part of their investigative strategies would help CJP ensure that its investigations progress in a timely manner.

In addition, we believe that increased supervisory review is necessary to prevent missed investigative steps in the future. The director—who currently serves as the only level of supervision over investigators—indicated that he reviews drafts of the memos investigators prepare for the commission describing investigations before CJP mails those memos to the commissioners. After the memos have been sent to the commission, the director meets with investigators to discuss these memos in preparation for commission meetings. Additionally, some of the investigators stated that before the commission's meetings, the investigators prepare case status reports for the director describing the actions they have taken to date and their planned next steps for their cases. The director reviews these status reports and asks questions about the status of cases as needed.

Although we acknowledge that these steps may provide the director with some level of familiarity with the progress of investigations, the timing and frequency of these status reports and memo reviews mean that the director is not likely to catch gaps in investigative approaches in a timely manner. Specifically, the memo review meetings occur after the commission has already received the investigators' memos, which include recommendations about how to proceed with their cases. Further, these activities occur only before commission meetings, which take place about seven times a year. The director also explained that if an investigation presents complex or unique issues, he will discuss the case with the investigator to

whom he is assigning it and that the investigator can meet with him about the case as it progresses. Although this process has obvious benefits, the director stated that it only happens with cases that CJP considers complex, leaving cases that it considers more straightforward unaddressed.

A more effective supervisory structure would employ a dedicated manager to supervise the investigators and review, approve, and monitor their investigative strategies and progress. The director would in turn supervise this investigations manager. This structure would be more consistent with CJP's approach to intake, in which it assigns an investigator as a supervisor over its intake staff, and it would also be in alignment with reasonable approaches to quality assurance. If CJP were to implement such a supervisory position, the investigations manager could review and approve investigation strategies before investigators begin their work and monitor their progress against those strategies to ensure the timely completion of investigations. Ultimately, an investigations manager would ensure that key steps are planned and performed.

Further, we believe CJP would benefit from establishing a process that empowers someone other than the investigations manager to perform periodic quality control reviews of the investigations it conducts. Before this audit, CJP's investigation practices had never been subject to external review. Although the confidentiality of CJP's investigations makes regular external reviews of its practices potentially difficult, CJP could use its office of the legal advisor to review its investigative practices on a periodic basis. The legal advisor's role—which, according to CJP's policies, is limited to assisting the commissioners in their adjudicatory functions and cannot include participation in the investigation of complaints—means that the legal advisor is insulated from the investigative staff's day-to-day activities and well positioned to periodically review the quality of their investigations. Specifically, the legal advisor could review a selection of completed investigations, report to the commission about the results of that review, and recommend that the commission adopt changes to CJP's investigative practices if warranted.

Unless CJP improves its practices, judicial misconduct may continue undetected and uncorrected. As we discuss in this chapter, CJP has not always taken all reasonable steps when investigating allegations of misconduct. Moreover, it has not always effectively investigated patterns of allegations, creating opportunities for unethical judges to remain on the bench. As an agency charged with protecting the public and ensuring the public's confidence in the integrity of the judiciary, CJP must improve its efforts to detect and deter judicial misconduct.

Unless CJP improves its practices, judicial misconduct may continue undetected and uncorrected.

Recommendations

To ensure that it adequately investigates alleged judicial misconduct, CJP should do the following by April 2020:

- Implement processes to ensure that for each of its investigations, CJP's management reviews and approves an investigation strategy that includes all steps necessary to substantiate whether misconduct occurred.
- Create and fill a new investigations manager position and task that individual with reviewing and approving investigative strategies, as well as overseeing the execution of those strategies.
- Expand the role of its legal advisor's office to include periodic reviews of the quality of closed investigations and, as warranted, to recommend changes to CJP's investigative practices.

To ensure that it leverages all available information to uncover misconduct, CJP should establish procedures by April 2020 for more regularly exercising its oversight authority to open investigations into patterns of potential misconduct. At a minimum, these procedures should require that intake attorneys assess complaints to identify when patterns of complaints merit recommending an investigation.

To allow it to detect potential judicial misconduct associated with legal errors, CJP should immediately direct its staff to use more appropriate allegation codes when closing complaints at intake. By October 2019, CJP should determine what data it will need to begin tracking so it can trend information—voluntarily provided by complainants—that could indicate complaints about legal error should be investigated because there is a risk that legal error is the result of underlying misconduct, such as bias. By October 2019, CJP should also develop procedures that indicate how often it will evaluate its data for such trends and establish guidelines for when trends warrant CJP staff recommending that the commission open an investigation. CJP should begin tracking that information and implement these procedures as soon as possible.

To prevent the risk that it will fail to detect chronic judicial misconduct, CJP should create and implement procedures by October 2019 that require an investigator to review all prior complaints when investigating a judge and determine whether the prior complaints are similar to the current allegations. Further, the procedures should require that if a pattern of complaints indicates the potential for chronic misconduct, the investigator must recommend that the commission expand the investigation.

Chapter 2

CJP'S STRUCTURE AND DISCIPLINARY PROCESSES DO NOT ALIGN WITH BEST PRACTICES OR THE INTENT OF CALIFORNIA'S VOTERS

Chapter Summary

Since its inception in 1960, the commission has served as a single body that investigates alleged judicial misconduct. However, changes to the California Constitution over the past few decades have assigned that same unitary body greater responsibility for disciplinary decision making. As a result of these changes, commissioners who make disciplinary decisions are also privy to unproven allegations from investigations, creating the risk that inappropriate information may affect their ultimate decisions. This structure is not aligned with judicial discipline best practices, which recommend a bicameral—or two-body—commission. Further, instead of hearing cases itself, the commission has delegated a significant component of CJP's disciplinary proceedings to a panel of judges. The commission's use of judges to review evidence and reach conclusions about other judges' misconduct falls short of the intent of Proposition 190 passed in 1994, which sought to increase the public's role in judicial discipline. Because CJP's foundational statute exists in the California Constitution, reforms to address these issues will require a constitutional amendment. An ideal amendment would reform the commission into a bicameral structure and require the commission to hear its own evidentiary hearings.

CJP's Unitary Structure Does Not Align With Judicial Discipline Best Practices

Although CJP was the first judicial oversight commission of its type when Proposition 10 created it in 1960, several subsequent changes to its authority and discipline options have left its structure out of alignment with judicial discipline best practices. Since its inception, the commission has served as a single body charged with the investigation of alleged misconduct. However, the commission's role in the disciplinary decisions that result from those investigations has grown over time, as Figure 11 on page 35 shows. During this evolution, the commission has continued to serve as a single body even after major changes, such as a 1994 constitutional amendment that gave the commission the authority to censure or remove judges without the involvement of the Supreme Court. This unitary structure means that commissioners are involved in every aspect of each case, from intake and investigations through

The unitary structure allows commissioners who make disciplinary decisions to be privy to allegations of and facts about possible misconduct that should not factor into their decisions about discipline.

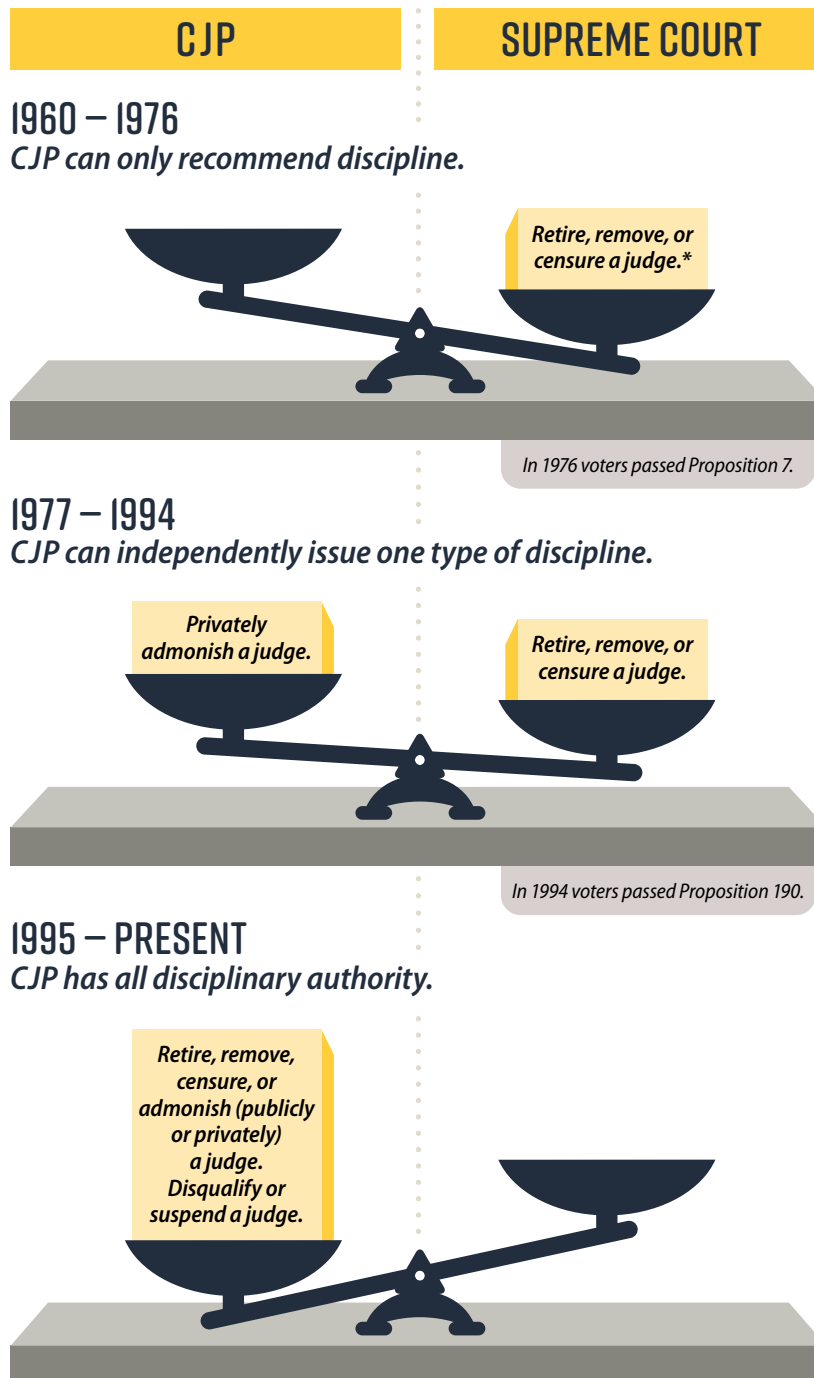
formal proceedings and final discipline. The Supreme Court has issued decisions concluding that CJP's investigative and adjudicatory structure does not violate judges' due process rights. Yet, these court decisions are decades old and rely in part on observations about CJP's structure that have since changed as a result of the passage of the 1994 constitutional amendment that increased the commission's adjudicatory authority. The unitary structure and the commission's involvement in all phases of a case pose potential problems for a judge's right to a fair hearing before a neutral decision-making body.

Specifically, the unitary structure allows commissioners who make disciplinary decisions to be privy to allegations of and facts about possible misconduct that should not factor into their decisions about discipline. We observed that CJP often pursues several allegations of misconduct within a single investigation but ultimately concludes that it cannot prove that all of the alleged misconduct occurred. In these cases, the commission makes a disciplinary decision about only the misconduct that it believes it has proven to the clear and convincing evidence standard. However, because the commissioners who make decisions about discipline were privy to information that CJP did not ultimately prove, there is heightened risk and potentially the perception that they may intentionally or unintentionally use that unproven information to reach conclusions about the appropriate discipline. Although it is not identical in nature, CJP's structure is analogous to a jury in a criminal case being composed of the detectives who investigated that case. As a result, the commission could potentially select a level of discipline that may be harsher or more lenient than the proven charges warrant.

In our review of 30 cases that resulted in public or private admonishment of a judge, we did not observe any instances in which the commission formally documented unproven information as support for its disciplinary decisions. Nevertheless, the commission does not document or record its deliberations, and CJP would never be able to assess any unspoken effects of the commissioners being aware of unproven allegations of misconduct. To support the appropriate level of discipline, the memos that staff prepared for the commission often referred to CJP's past decisions on similar misconduct. Using CJP precedent as a guide can serve to guard against the commission's decisions being too lenient or too harsh for a given misconduct. The commission could look at its prior decisions on similar misconduct to help it determine whether a particular level of discipline is appropriate. However, referring to precedent is effective as an approach only when the commission has made similar decisions in the past, which is not always the case.

Figure 11

CJP's Disciplinary Authority Has Grown Over Time Because of Constitutional Amendments



Source: Analysis of California constitutional amendments.

* Disciplinary authority to censure added as a result of voters passing a constitutional amendment in 1966.

A bicameral structure for judicial oversight commissions separates the functions of investigating and disciplining judges—an approach that 17 states have implemented.

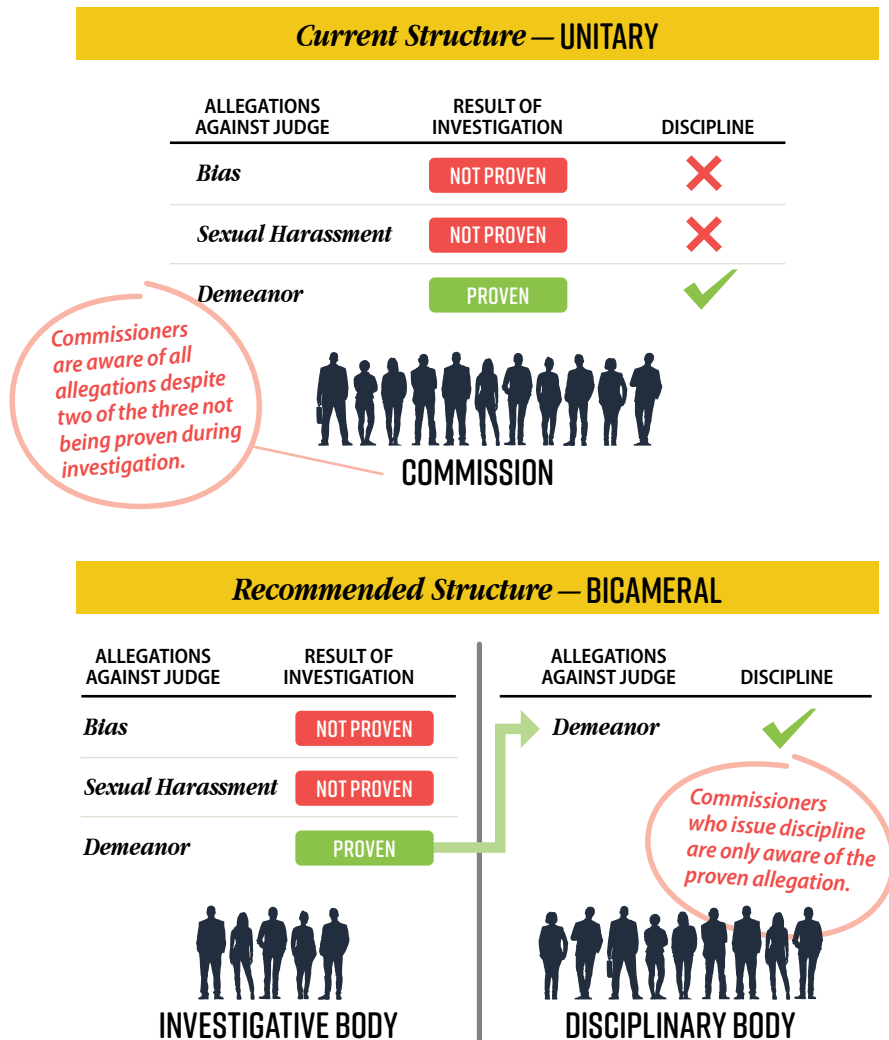
Another weakness of the commission's unitary structure is that the commission could be perceived as having prejudged cases before the start of formal proceedings. If a judge demands formal proceedings in response to a notice of admonishment, the same commission that authorized the notice of admonishment—a clear indication that it believes discipline is warranted—ultimately decides whether to issue discipline at the conclusion of formal proceedings. In 1994 the American Bar Association published model rules for judicial disciplinary enforcement that were developed by a committee of experts from across the United States after researching judicial discipline commissions in 12 states, including California. These model rules highlight that one of the most consistent complaints the committee heard from judges and their attorneys was the perceived unfairness of a system that combines investigation, prosecution, hearing, and decision making into a single process. Specifically, once a commission is exposed to all the investigative information and files formal charges, judges believed that it is nearly impossible for the same commission to be a neutral adjudicative body and that the appearance of fairness is not met.

To address these types of concerns, best practices recommend a bicameral structure for judicial oversight commissions that separates the functions of investigating and disciplining judges—an approach that 17 states have implemented. Figure 12 shows how a bicameral structure ensures that a commission bases its disciplinary decisions only on proven misconduct. The model rules recommend a smaller investigative body and a larger hearing body, with separate legal counsel responsible to each. Under this composition, no member of a commission is involved both in deciding whether to file formal charges and in hearing the case resulting from those charges.

Although we believe the American Bar Association model rules present a best practice for structuring CJP, we do not believe California should adopt a related portion of the model rules. Specifically, the American Bar Association recommends that a state's highest court impose judicial discipline. For a large part of CJP's existence, the Supreme Court served in that capacity for removals and censure. In fact, the Supreme Court determined in a 1989 ruling that the commission's investigation and adjudicatory functions under its unitary structure did not pose a due process concern in part because the Supreme Court was the final decision maker. However, the Supreme Court has not been responsible for imposing discipline since a constitutional amendment—which took effect in 1995—gave CJP authority to retire, remove, or censure a judge without the involvement of the Supreme Court.

Since then, the Supreme Court has served a different role in the State's judicial discipline framework: it can choose to review petitions from judges who request reviews of CJP's disciplinary decisions. This role, which is similar to that of an appellate court, is a function the American Bar Association model rules do not include. Even if California adopted a bicameral structure for CJP, we believe that the Supreme Court's current role is effective and should not be changed.

Figure 12
Under the Bicameral Structure, the Disciplinary Body Is Not Privy to Unproven Allegations



Source: Analysis of judicial best practices displayed through a hypothetical example.

CJP's Reliance on Judges to Hear Cases Involving Their Peers Falls Short of the Intent of Proposition 190

Findings of Fact and Conclusions of Law

Findings of Fact: Determinations about the facts of a case, including witness credibility determinations. CJP's findings of fact must be supported by clear and convincing evidence.

Conclusions of Law: Determinations setting forth the legal basis for CJP's decisions regarding a violation of the ethics code and the associated level of misconduct.

Source: California courts, American Bar Association glossaries, a court case, and CJP decisions.

Structuring CJP as a bicameral commission would also allow CJP to more fully realize the intent of Proposition 190, which California's voters passed to increase the public's involvement with judicial discipline. Although the commission can hear cases in formal proceedings, CJP relies on an independent panel of three judges—known as special masters—to preside over an important portion of formal proceedings: the evidentiary hearing. Figure 13 summarizes the special masters' role in this hearing. Following the conclusion of an evidentiary hearing, the special masters must prepare a report of proposed findings and conclusions, along with an analysis of the evidence and the reasons for their findings and conclusions. The text box further defines these terms. The special masters' report does not comment on the discipline that the commission should issue.

The Commission Rarely Alters the Special Masters' Findings, but It Often Reaches Different Conclusions Based on Those Findings

At the conclusion of an evidentiary hearing, the special masters submit their report to the commission, which can disregard the special masters' report and may prepare its own findings and conclusions. However, the commission rarely altered the findings of the special masters in the cases we reviewed. From fiscal years 2013–14 through 2017–18, CJP accepted the special masters' findings for four of the five cases that completed formal proceedings. Supreme Court decisions have guided the commission's approach to adopting the special masters' findings. When the Supreme Court was responsible for making disciplinary decisions, it gave the special masters' findings *special weight* because the masters had the advantage of observing the demeanor of the witnesses and were therefore better able to determine the credibility of witnesses. The commission has continued this practice since it became responsible for making disciplinary decisions.

This special weight can influence the commission's decisions about discipline and may have contributed to a judge receiving a lesser form of discipline in one case we reviewed. In this case, a critical finding related to the credibility of the accused judge's testimony. In their final report, the special masters reached the finding that insufficient evidence existed that the judge had acted in bad faith or for a corrupt purpose when he ordered the release of an arrestee whom he knew personally. In the final disciplinary decision, the commission commented that based on their review of the

transcript of the judge's testimony, they found it difficult to agree with the special masters' finding. Nevertheless, the commission deferred to the special masters' finding and consequently did not conclude that the judge engaged in willful misconduct, which is conduct committed in bad faith and the most severe form of misconduct. Instead, the commission found that the judge engaged in prejudicial misconduct, which is a less serious level of misconduct. The commission issued a decision of severe public censure—a less serious form of discipline than removal—and specifically commented that the finding that the judge acted in good faith was a factor that influenced its disciplinary decision.

Figure 13

CJP Relies on Special Masters to Make Rulings on the Admissibility of Evidence and to Determine the Credibility of Witnesses



Source: Analysis of CJP's rules, trial counsel manual, and new member orientation documentation.

In contrast, the commission gives less deference to the special masters' conclusions than it does to their findings. This practice continues the approach taken by the Supreme Court when it was responsible for disciplinary decision making. The commissioners adopted the special masters' conclusions for 40 out of the 50 instances of misconduct in the five cases that completed formal proceedings from fiscal years 2013–14 through 2017–18. However, in one case, the commission adopted the special masters' conclusions for 31 out of the 32 instances of misconduct—an unusually high number of instances of misconduct in a single case. Excluding this case, the commission adopted the conclusions of the special masters for nine of the remaining 18 conclusions. In all nine instances in which the commission did not adopt the special masters' conclusions, the commission concluded that the judges in question had engaged in a more serious level of misconduct than the special masters had concluded.

The commission's disagreements with the special masters on the findings and conclusions have been the reason for some judges' petitions for review to the Supreme Court. Two of the five judges who completed formal proceedings with CJP during the five years we reviewed filed petitions for review by the Supreme Court. In one case, one of the reasons that the judge petitioned the Supreme Court for a review was the judge's belief that the commission ignored a critical finding by the special masters. The judge argued that because it ignored this finding, the commission concluded that

he had engaged in more serious misconduct and therefore removed him from the bench. In the second case, a judge argued that the commission reached incorrect conclusions because it determined that he had engaged in more instances of and more severe misconduct than the special masters had found. The judge argued that the commission had a pattern of harsher rulings against judges than the special masters. Ultimately, the Supreme Court denied both petitions and left CJP's disciplinary decisions intact. However, as long as the commission does not directly hear cases, judges will likely continue to use differences between the special masters' findings and conclusions and those of the commission to challenge the commission's decisions.

Moreover, because CJP's rules require the special masters to be judges or retired judges, the special masters oversee proceedings related to the conduct of their peers. This scenario falls short of the intent of Proposition 190 passed in 1994, which sought to heighten transparency and increase the public's role in judicial discipline through the reforms listed in the text box. Supporters of the proposition argued that

Reforms Resulting From Proposition 190

- Increased the number of commissioners from nine to 11.
- Created a public majority by increasing the number of public commissioners—non-judge, non-attorney members—to six.
- Made public all formal proceedings instituted after February 28, 1995.
- Shifted the authority to retire, censure, and remove judges from the Supreme Court to CJP.
- Shifted the authority to make rules from the Judicial Council of California to CJP.

Source: Proposition 190, passed in 1994.

its changes to CJP's composition would "ensure public control of judicial discipline" and "would eliminate judicial domination of CJP in favor of a public majority."⁶

However, since the passage of Proposition 190, CJP has never heard its cases and has continued to exclusively use the special masters to hear evidence and assess the credibility of witnesses. The practice of using specially appointed fact-finders is not unusual in other proceedings similar to CJP's formal proceedings. However, in CJP's case, the special masters are overseeing proceedings related to their peers. This leaves judges with a significant amount of influence over judicial discipline—which may impact the control that voters wanted to place in the hands of the public. As we note earlier, when the commission and the special masters disagreed during the period we reviewed, the commission always chose to elevate the level of misconduct. This fact indicates that in these cases, the special masters tended to be more lenient when making determinations about their peers.

The special masters oversee proceedings related to their peers, leaving judges with a significant amount of influence over judicial discipline.

Eliminating CJP's Use of Special Masters Would Better Align Its Processes With Best Practices

If the commission began hearing cases, CJP would better align its disciplinary processes with best practices. As we describe earlier, the American Bar Association model rules suggest that judicial discipline commissions adopt a bicameral structure, with one body focused on investigations and the other on discipline. The model rules further suggest that the discipline body should generally hear its own cases and delegate this function to a third-party only when hearing a case would be burdensome to the disciplinary body. Although the commission currently has the option to preside over the evidentiary hearings, it has never done so. In fact, CJP has not developed a full set of rules for how the commission would preside over evidentiary hearings, despite having rules to govern how the special masters must do so. For example, as Figure 13 on page 39 shows, CJP's current process requires both trial counsel and the judge's attorney to submit proposed findings and conclusions to the special masters, who then file a report with the commission. The commission then considers the entire record and determines the level of discipline.

However, CJP's rules do not describe the steps at the end of an evidentiary hearing if the commissioners hear the evidence directly. Specifically, although CJP's rules allow for a subset of commissioners to preside over an evidentiary hearing, the rules

⁶ The Secretary of State Office's *Official Voter Information Guide for 1994 General Election*.

do not address how those commissioners would report to the rest of the commission about the results of the hearing. Therefore, it is not clear how a judge would have the opportunity to review the conclusions from the hearing before the commission determines a level of discipline. Judges currently have this opportunity when the special masters preside over the hearing. This gap in the rules makes it less likely that the commission would ever appoint a subset of commissioners to hear a case directly.

According to the legal advisor who worked for the commission during the majority of this audit (legal advisor), the commission has never heard cases for two reasons: due process and logistics.⁷ The legal advisor stated that the special masters provide a layer of due process protection because they help separate CJP's investigation function from its determinations about discipline. Her observation has some merit under the current unitary structure, although the commission is privy to unproven allegations and still makes the final decision about discipline. As we discuss previously, a bicameral structure would separate the commission's investigative and disciplinary responsibilities.

The legal advisor informed us that the special masters are also in a better position than the commission to spend the time hearing cases, which can take from a few days to over a week to complete. The commissioners are unpaid volunteers, whereas the legal advisor explained that the special masters are paid by their respective courts while hearing evidence during CJP proceedings. Additionally, the legal advisor expressed concern that if the commission heard cases, it might add to the expense of the hearings because CJP would have to pay for the commissioners' transportation and lodging. However, we believe that these challenges are not insurmountable.

Although hearing cases directly would place new requirements on the commissioners, the State has options for mitigating concerns about these increased expectations.

Although hearing cases directly would place new requirements on the commissioners, the State has options for mitigating concerns about these increased expectations. First, it could compensate commissioners who serve on the disciplinary body for the time they spend hearing cases. When CJP initiates formal proceedings, its rules provide judges multiple opportunities to respond and access the evidence that CJP collects. As a result, based on our review of the five completed formal proceedings from fiscal years 2013–14 through 2017–18, the length of time from the notice of formal proceedings to the final decision can be almost a year. If commissioners heard cases directly, they would need to work for specified periods throughout this yearlong process. CJP would also

⁷ The legal advisor retired at the end of February 2019, which was five months into the audit.

need to ensure that at least one judge or attorney member of the commission participated in the evidentiary hearing to best ensure that it can enforce evidentiary standards.

However, even given these parameters, we do not anticipate that compensating commissioners for the time they spend on formal proceedings would be a large expense. Assuming that the commissioners would spend about 200 hours working on a case—which is the number of hours that the legal advisor estimated the special masters currently spend preparing for formal proceedings, plus the average amount of time that formal proceedings last—we estimate that each case would cost \$17,000 per commissioner. Thus, if three commissioners heard the case, formal proceedings would cost approximately \$51,000. This estimation assumes that the State would compensate all commissioners at a rate similar to the salary CJP pays its highest compensated staff attorney. This added cost would not be a significant burden considering that CJP completed an average of one formal proceeding annually during our review period. Another option is that CJP could specify that a rotating subset of commissioners would hear formal proceedings. This option would reduce the time commitment that any one commissioner would need to make.

CJP Lacks Clear Authority to Require Corrective Actions That Might Reduce Judicial Misconduct

Unlike comparable entities, CJP does not have express authority to require corrective actions as part of its disciplinary decisions. Although the legal advisor told us that CJP has recommended judges take corrective action—specifically, participating in a pilot mentoring program—its rules provide it with limited options for employing additional corrective actions. Further, the portions of the California Constitution that establish CJP do not expressly provide CJP with the option to require corrective actions. For instance, the legal advisor stated that CJP has no authority to require that judges take educational classes on judicial ethics, even though it considers participation in these types of classes a mitigating factor when it determines discipline.

CJP recently began operating, on a pilot basis, a mentoring program that seeks to foster changed behavior of judges who have been accused of poor demeanor through guidance from trained mentor judges. CJP can offer the program to judges at the completion of its investigations, but judges must agree to participate and participation is currently limited to Northern California. The director stated that as of February 2019, one judge had completed the program and three other judges were enrolled. He further stated that if a judge successfully completes the program, CJP will take that judge's participation

CJP recently began operating a mentoring program that seeks to foster changed behavior of judges who have been accused of poor demeanor through guidance from trained mentor judges.

into consideration when determining the disposition of the case. According to the director, CJP approved expanding the program to Southern California in March 2018, and it is in the process of selecting mentors and setting up the program in that part of the state. Further, the director anticipates that CJP will make the program permanent by the beginning of next fall once it covers the entire State.

If CJP had the express authority to impose corrective action requirements when it issues discipline, it would have additional options to address judicial misconduct. According to the legal advisor, CJP would benefit from having more corrective action options, such as therapy, anger management, ethics classes, and substance abuse treatment. The chair of the commission also said that corrective actions would be useful in helping CJP advance its mission to protect the public. CJP's director indicated that corrective actions could be a positive addition to the commission's authority. However, he explained that having an investigating attorney both monitor a corrective action and later recommend discipline for failure to comply with a corrective action might cause due process concerns. If the commission were bicameral, it could address this issue. Under the bicameral structure, the investigative body would recommend the corrective action, along with discipline, to the disciplinary body, and the disciplinary body would decide whether to impose the corrective action. A CJP staff member who was not a part of the original investigation could monitor the corrective action to address any potential due process concerns.

Comparable entities have the authority to use corrective actions in conjunction with discipline to reinforce positive behaviors in those whom they oversee.

Comparable entities, including 18 judicial discipline commissions from other states, the State Bar of California (State Bar), and the Medical Board of California (Medical Board), have the authority to use corrective actions in conjunction with discipline to reinforce positive behaviors in those whom they oversee.⁸ For example, in addition to disciplining attorneys, the State Bar can require additional conditions, such as educational or rehabilitative work regarding law, ethics, or law office management. Similarly, the Medical Board can require licensed doctors placed on probation to participate in additional professional training and to pass an examination upon completion of the training. To enable CJP to better meet its mission of protecting the public, enforcing rigorous standards of judicial conduct, and maintaining public confidence in the integrity and independence of the judiciary, the California Constitution could provide it with express authority to issue corrective actions along with discipline. This change would strengthen CJP's ability to prevent judicial misconduct from reoccurring.

⁸ We based our information about other states on a June 2015 analysis that the National Center for State Courts conducted of available sanctions in judicial discipline proceedings.

Reforming CJP's Structure and Operations Would Require an Amendment to the California Constitution

Since its inception, statewide ballot propositions and Supreme Court decisions have incrementally changed CJP's composition, authority, and disciplinary options. For example, when it was first established, CJP had nine members, and the majority were judges. Further, at the time, CJP could not remove or retire a judge; rather, CJP could only recommend that the Supreme Court remove or retire a judge. As we discuss earlier, effective in 1995, Proposition 190 expanded CJP's membership to 11 members, changed its composition to a citizen majority, and allowed it to retire, remove, or censure a judge without Supreme Court approval.

The voters passed the last constitutional amendment that significantly changed CJP's structure and operations in 1994. Our review—the first of its kind and conducted nearly 25 years since the last major constitutional amendment—found that CJP's structure and process require significant reforms for CJP to optimally meet its mission to protect the public, enforce rigorous standards of judicial conduct, and maintain public confidence in the integrity and independence of the judicial system. In this chapter, we have detailed the changes necessary to more closely align CJP's structure and operations with best practices, ensure that its processes better meet the intent of California voters, and provide it with additional options for addressing judicial misconduct.

Because these changes are significant and because much of the foundational criteria for CJP's structure and operations rest in the California Constitution, the implementation of our recommendations would require an amendment to the California Constitution. To this end, the Legislature could propose a constitutional amendment as we depict in Figure 14 on the following page. The passage of this amendment would require a majority of California's voters to agree to change CJP's structure, require the commission to hear cases, and explicitly authorize CJP to use corrective actions to address misconduct. The amendment would also need to address adding commissioners to ensure that each body has an odd number of members, which is important for voting purposes. Additionally, to hear its own cases without engaging in prejudicial activity the disciplinary body will need to be able to reserve at least three members for formal proceedings. Although we recognize that these changes are substantial, we believe they are necessary to ensure that CJP is positioned to effectively protect both the judges' rights to due process and the public.

The voters passed the last constitutional amendment that significantly changed CJP's structure and operations in 1994.

Figure 14

Reforming CJP's Structure Will Require a Constitutional Amendment

AMEND THE CONSTITUTION TO

- Establish a **bicameral commission** with a public majority in both the investigative and disciplinary bodies.
- Require the disciplinary body to hear its own formal proceedings.
- Authorize the commission to use corrective actions.

Example of a Bicameral CJP Structure

INVESTIGATIVE BODY

Responsible for:

- Receiving complaints and determining which to investigate.
- Deciding to close investigations without discipline.
- Submitting an investigation report to the disciplinary body if it proves misconduct.



DISCIPLINARY BODY

Responsible for:

- Reviewing the investigation report and issuing the judge a notice of intended discipline.
- Hearing formal proceedings, if necessary.*
- Issuing discipline including corrective actions.



Source: California State Auditor's recommendations.

* To hear its own cases without engaging in prejudicial activity, the disciplinary body would need to reserve at least three commissioners who did not participate in issuing the notice of intended discipline so that those commissioners could make disciplinary decisions at the end of formal proceedings.

Recommendations

The Legislature should propose and submit to voters an amendment to the California Constitution to accomplish the following:

- Establish a bicameral structure for the commission that includes an investigative and a disciplinary body. The proposed amendment should also require that members of the public are the majority in both bodies and that there is an odd number of members in each body.
- Require that the disciplinary body directly hear all cases that go to formal proceedings and that CJP make rules to avoid prejudicial activity when it hears these cases. The amendment should also require that a majority of the commissioners who hear cases be members of the public and should establish that the State will compensate commissioners for their time preparing for and hearing cases.
- Direct CJP to make rules for the implementation of corrective actions. Establish that such actions are discipline that should be authorized by the disciplinary body and that CJP should monitor whether judges complete the corrective actions.

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Chapter 3

CJP HAS NOT TAKEN CRITICAL STEPS TO IMPROVE ITS TRANSPARENCY AND MODERNIZE ITS OPERATIONS

Chapter Summary

In light of the public criticism that it has received over many years and of the value that greater public awareness could provide to its mission, we would expect CJP to have recognized the importance of informing the public about its role and operations. However, it has not taken sufficient action to increase its accessibility or transparency. For example, it has not engaged in outreach campaigns to the general public to promote its mission, provided clear information about its complaint process on its website, or accepted complaints electronically. Further, unlike many state entities, it has not held meetings that are open to the public to discuss its rulemaking, even though its rules are foundational to its operations. Moreover, CJP has not taken critical steps to modernize its operations, such as replacing its antiquated case management system.

Although both modernization efforts and the other improvements we recommend throughout this report will require additional funding, we have identified \$504,000 in budget efficiencies that, if realized, could allow CJP to maximize the resources available for its core functions of intake, investigations, and formal proceedings. In addition, to implement the improvements we have suggested, we estimate that CJP will need a one-time budget allocation of \$419,000. If it addresses our concerns about accessibility and transparency, CJP may find that it needs additional, ongoing resources to address an increased workload, and it should report regularly to the Legislature about these potential needs.

CJP's Lack of Transparency and Accessibility to the General Public Diminishes Its Ability to Enhance Public Trust in the Judiciary

CJP has not pursued changes to its operations that would bolster public accessibility and transparency while still adhering to its confidentiality obligations. This inaction is true despite the distrust that some in the general public have expressed about CJP for more than thirty years, as we discuss in the Introduction. In light of these criticisms, we believe CJP should have attempted to make itself more accessible and transparent when possible. Such changes include establishing a public outreach campaign, improving the availability of information on its website, accepting electronic complaints, and holding meetings open to the public when appropriate. Although CJP's confidentiality policies limit

CJP has not made an adequate effort to ensure that members of the general public know of its existence, or of the role it plays in the judicial system.

its ability to share some information with the public, opportunities exist for CJP to increase public transparency and accessibility, thereby improving the public's trust in the judiciary.

CJP Has Performed Only Limited Public Outreach

CJP has not made an adequate effort to ensure that members of the general public know of its existence, or of the role it plays in the judicial system. According to its list of outreach events, CJP participated in an average of 25 meetings and presentations annually from fiscal year 2013–14 through 2017–18. However, these meetings usually involved court employees and legal professionals, and they generally did not include opportunities for members of the general public to learn about CJP's role, mission, or processes. For example, of the 21 events during fiscal year 2017–18 that CJP participated in, 16 events were aimed at legal professionals and one was a conference for people who regularly work in or interact with courts, such as social workers and probation officers. The remaining outreach events were for law schools and groups with an international focus, such as an international visitor leadership program. According to the chair, commissioners sometimes speak about CJP on their own to organizations such as local rotary clubs. However, none of the events in which CJP formally participated during the 2017–18 fiscal year targeted the general public. In fact, in the five fiscal years we reviewed, CJP participated in only three events that targeted the general public out of more than 120 events total over that period.

Additionally, CJP depends on courts' cooperation if it wants to publicize its existence in courthouses. CJP's legal advisor explained that CJP has no authority to require courts to post or display information about CJP or the process for filing complaints, although CJP's supervising administrative specialist told us that CJP has provided brochures to a few courts that requested the information. Because the State does not require courts to post information about CJP in prominent locations within each courthouse, a significant gap exists in the accountability of the judicial system. Those who are most likely to observe judicial misconduct—such as court staff, jurors, and litigants—can generally be found in the State's courthouses.

A requirement that courthouses post information about CJP in prominent locations would not be unprecedented. For example, one option for doctors to meet the Medical Board's public notice requirements is to prominently post a notice with the Medical Board's contact information in an area that is visible to patients. If the Legislature amended state law to compel courts to comply with similar notification requirements, information about what CJP does and how to contact it would be readily accessible in courts. The presence of this information would better ensure that court staff and members of the public who interact with judges are aware of how to file complaints regarding judicial misconduct.

CJP Has Not Ensured That Its Website Clearly Presents Sufficient Information About the Complaint Process

CJP's website does not provide adequate guidance about how to submit complaints that include sufficient information for it to initiate an investigation. We found that when individuals who were not attorneys submitted complaints, CJP was nearly 50 percent more likely to close the complaints without performing an investigation, compared to when attorneys submitted them. Factors such as the attorneys' legal training and the frequency with which they interact with judges could explain why CJP investigates their complaints more frequently. However, the fact that so many of the complaints submitted by members of the general public lack merit may indicate that CJP could do more to educate the public about its processes and requirements.

For example, during our review of CJP's intake processes, we observed that intake attorneys cited missing information, such as specific quotes or documents, as reasons for not recommending that complaints be forwarded to the investigation stage. However, the complaint form and CJP's website do not adequately emphasize the importance of this information. CJP's website states that complainants may submit documentation or may mention the availability of documentation in their complaints. Likely in part because of this instruction, the complaints we reviewed included a wide range of details and documentation. We believe there would be value in CJP developing better resources for potential complainants. For instance, it could provide examples of high-quality complaints to illustrate what constitutes misconduct and what CJP looks for when evaluating a complaint.

CJP Has Maintained a Rigid Approach to Accepting Complaints

CJP accepts complaints only through the mail, as opposed to allowing for more convenient submissions through its website. We find this approach concerning, particularly because similar agencies in California—the State Bar and Medical Board—allow complainants to submit concerns through their websites. Moreover, 14 of CJP's peer organizations in other states have also implemented electronic complaint submission, either through their websites or through email. Washington's commission informed us that it observed a 30 percent increase in the number of complaints it received annually after it transitioned to online complaint submission. In California, accepting complaints online would increase CJP's accessibility to the public.

One recent instance demonstrates how accepting electronic complaints would increase CJP's public accessibility. In this case, a homeless complainant emailed his complaint and other documents to CJP's former director in September 2017. Later that month, staff

When individuals who were not attorneys submitted complaints, CJP was nearly 50 percent more likely to close the complaints without performing an investigation, compared to when attorneys submitted them.

In early 2016, the former director claimed to be implementing an online complaint system, but more than three years later CJP has yet to do this.

responded by informing the complainant that CJP does not accept emailed complaints and that he could mail his complaint, which he did in April 2018. This effectively delayed the commission's review of his complaint by about seven months. The commission subsequently closed the complainant's case in May 2018. However, despite having an email address with which to contact the complainant, CJP did not notify him of the closure because it did not have a physical mailing address to which it could send a letter. In October 2018, the complainant emailed CJP requesting an update and provided CJP with a mailing address. Only then did CJP inform him that it had closed his complaint almost six months earlier. In this instance, CJP's unwillingness to accept electronic complaints created unnecessary hurdles for a member of the public who was concerned about potential judicial misconduct.

In early 2016, the former director claimed to be implementing an online complaint system, but more than three years later, CJP has yet to do this. Specifically, as part of an approved budget change proposal for fiscal year 2016–17, the former director reported to the Department of Finance that CJP was working with the California Department of Technology (Technology)—which hosts CJP's website—to develop the capacity to receive complaints online. The legal advisor's administrative assistant, who worked on the issue, told us that the default version of Technology's website platform did not have the capability to accept electronic complaints at the time. However, she also explained that Technology told CJP that it could pay to have Technology customize the website to meet this need. Despite this option, CJP has not taken the steps that would enable it to accept online complaints because it has not made doing so a priority. Because modernizing CJP's complaint process would increase its accessibility to the public, we believe that CJP should work to address this issue. We discuss concerns with the ability of CJP's case management system to handle electronic complaints later in this chapter.

CJP Does Not Hold Meetings Open to the Public to Discuss Its Rules or Operations

In contrast to many other government boards and commissions, CJP does not hold public meetings. State law generally requires many state boards and commissions to provide public notices of meetings, to provide the public opportunities to comment on matters discussed during such meetings, and to conduct their meetings in public unless specific circumstances as authorized in state law—such as a discussion of confidential matters—merit meeting in a closed session. These requirements do not apply to CJP because the judicial branch is exempt from these requirements. We are particularly concerned about how this lack of requirements

affects CJP's rulemaking. CJP's rules are foundational to how it operates, and it therefore seems prudent to provide the public with a forum for discussing potential changes to those rules. However, unlike the rulemaking requirements of many other agencies in the State, CJP's policies do not require it to hold public hearings at the request of an interested party. Instead, CJP's policies provide only one method for the public to engage with CJP during its rulemaking process: submitting written comments on proposed rule changes.

Although we acknowledge that the confidential and sensitive nature of the majority of CJP's work means that it must conduct much of its business in meetings that are closed to the public, we believe that CJP could discuss the nonconfidential elements of its operations—such as its proposed rule changes, operational statistics, and complaint data trends—in public. These meetings could occur at least every other year, in alignment with its biennial rulemaking process. Although Texas's judicial discipline commission has similarly restrictive confidentiality requirements, it is nevertheless required to hold a public hearing every other year to consider public comments regarding its mission and operations. A similar effort by CJP would increase transparency and accessibility, while helping to mitigate concerns that it is not accountable to the public.

When we discussed public meetings with the commission's chair, she was willing to consider holding public meetings in conjunction with CJP's rulemaking process. However, she expressed safety concerns that other CJP staff echoed. The new legal advisor asserted that the commission would require the presence of law enforcement at these meetings to provide security for judges who are members of the commission. Further, she stated that this security should be considered even if judge members were not present because the commission deals with people who are very angry and sometimes frightening, some of whom CJP has referred to law enforcement.

Regardless, the chair acknowledged the importance of helping members of the public learn about CJP and agreed that taking the steps we mention above—expanding public outreach, accepting complaints online, and holding public meetings in conjunction with rulemaking—would help CJP better fulfill the public protection element of its mission. The director also generally agreed with our findings about transparency and accessibility to the public. He stated that CJP is always looking for ways to expand outreach to the public, but he also indicated that accepting complaints online would present challenges for CJP because it does not have the necessary staff or resources to develop this capability. We discuss CJP's resources in the subsequent sections of this chapter.

CJP's policies provide only one method for the public to engage with CJP during its rulemaking process: submitting written comments on proposed rule changes.

CJP's Outdated Case Management and Filing Systems Have Reduced Its Efficiency and Effectiveness

CJP's case management system is outdated, and overhauling it to help CJP better process complaints would be challenging. According to the supervising administrative specialist, CJP's former information technology (IT) specialist developed its case management system almost 25 years ago. However, he did not create any written instructions for operating or maintaining the system. CJP has had an IT specialist position that has been vacant since this individual retired in early 2014, and the supervising administrative specialist informed us that CJP stopped attempting to recruit for the position during the summer of 2014 because of a lack of qualified, interested candidates. Because CJP lacks guidance for how its antiquated case management system works, it relies on an external consultant to ensure that the system continues to function. This external consultant cost about \$100,000 in fiscal year 2017–18.

Even if CJP developed the capacity to accept online complaint submissions, it is unclear whether its case management system could accept these complaints directly. The supervising administrative specialist informed us that she believes CJP would need to enter data manually from electronic complaints into its system in the same way that it currently enters data manually for the complaints it receives through the mail. This would undermine one of the main efficiencies that CJP might otherwise gain from accepting electronic complaints. That said, CJP could not demonstrate that it had ever attempted to accept electronic complaints directly to its database. Because of the case management system's age and lack of related documentation, CJP would likely face significant challenges if it attempted to modify the system to accept electronic complaints directly. However, as long as it relies on its outdated system, CJP will be significantly hindered from increasing its accessibility to the public.

CJP has not ensured that the case management system has the technical capabilities necessary for it to improve its intake and investigation processes.

Moreover, CJP has not ensured that the case management system has the technical capabilities necessary for it to improve its intake and investigation processes. As we describe in Chapter 1, CJP has not effectively leveraged its information on complaints to identify when a pattern of complaints suggests that it should open an investigation of potential misconduct. In fact, the current case management system makes it difficult for investigators to identify such patterns. The system can generate lengthy reports that provide certain types of information, such as the status of each investigation, but it cannot easily produce aggregated data reports that show the number of prior complaints for each judge and the nature of the allegations in each complaint. Further, even if the system had the ability to produce more efficient and user-friendly

reports of previous misconduct, CJP would still face challenges because it has not entered the data in a way that would allow it to easily identify patterns of allegations, as we discuss in Chapter 1.

A more effective case management system would offer CJP other benefits as well. Specifically, CJP could establish a paperless approach to its case files that would provide it with cost and time efficiencies. CJP currently maintains paper files for every complaint it receives. In contrast, judicial discipline commissions in New York and Washington have eliminated using paper files and transitioned to electronic case management systems, allowing them to more efficiently provide information to commissioners and significantly cut the cost and time associated with packaging and mailing meeting materials. For example, Washington's judicial discipline commission provides its commissioners with electronic devices and a secure email system that allows them to access meeting materials. This approach is significantly more efficient than CJP's, whose staff must organize and compile two separate sets of voluminous paper files and send them via mail to each commissioner before each meeting. If it had the capability to transmit the information electronically, CJP could eliminate this time-consuming process and the related costs.

Despite the significant challenges that its case management system poses, CJP has not requested the funds necessary to modernize it. The director indicated that he would like to obtain the funding to develop and maintain a new case management system that would allow CJP to move to a paperless operation, but he asserted that CJP did not have the IT staff available to implement such a system. However, without a modernized case management system, CJP will continue to operate with an outdated system that hinders its ability to make itself a more accessible and effective organization. Considering a new system's potential to streamline and enhance CJP's ability to fulfill its mission, we believe a one-time allocation of resources to transition to a new case management system is warranted, as we describe in more detail in the final section of this chapter.

Despite the significant challenges that its case management system poses, CJP has not requested the funds necessary to modernize it.

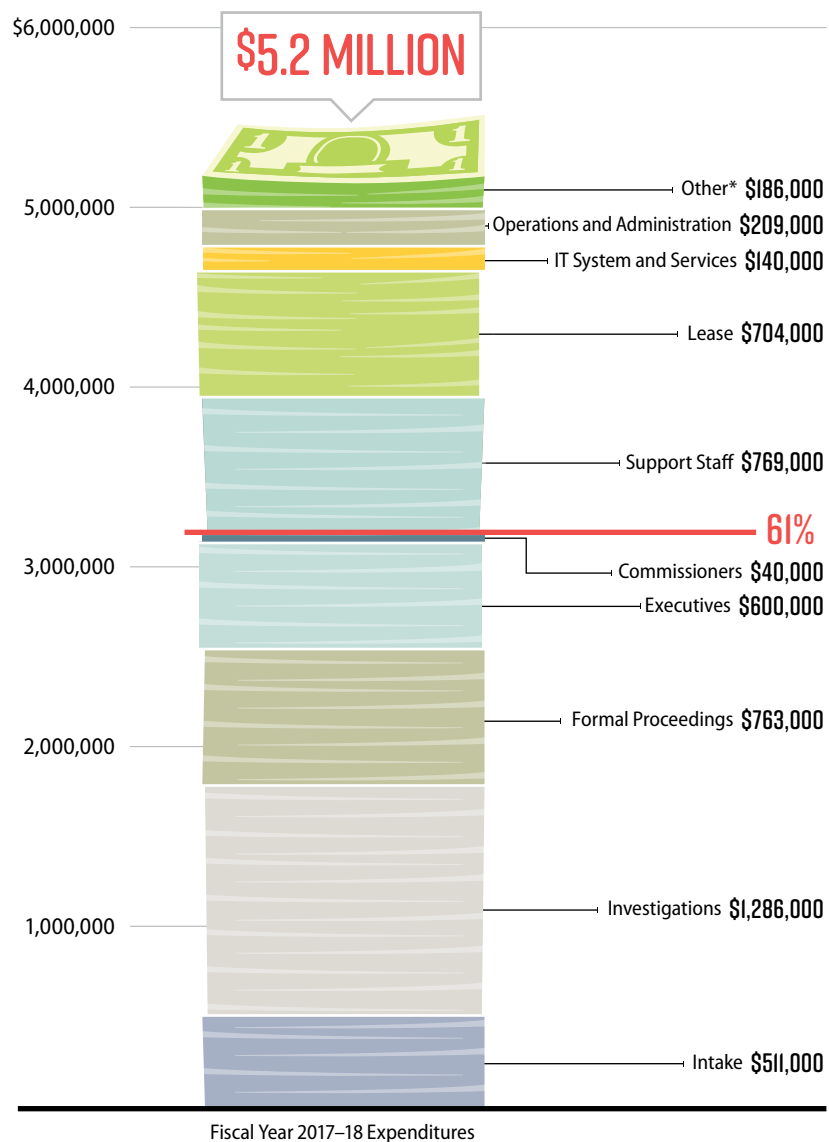
CJP Has Not Maximized the Resources Available for Its Core Functions

As Figure 15 on the following page shows, CJP spent only 61 percent of its budget, or about \$3.2 million, on its core functions—intake, investigations, and formal proceedings—in fiscal year 2017–18. Almost all of these expenses relate to the salaries and benefits for the 12 attorneys who perform work at each stage of the complaint review process, as well as for the director and the legal advisor, whom we included in this category because they are directly involved in CJP's investigations and formal proceedings processes, respectively. During the five years we reviewed, CJP spent between 50 to 61 percent of its total budget on its core functions.

We recognize that CJP must allocate some of its budget to renting office space, maintaining support staff, and ensuring access to legal research. However, opportunities exist for it to devote more resources to its core functions and to its mission to protect the public and maintain confidence in the integrity of the judiciary.

Figure 15

In Fiscal Year 2017–18, CJP Spent Only 61 Percent of Its \$5.2 Million Budget on Its Core Functions



Source: Analysis of CJP's fiscal year 2017–18 budget, expenditures, and payroll data.

Note: Fiscal year 2017–18 was the year of our audit period in which CJP spent the highest percentage of its funds on its core functions. During the five years we reviewed, CJP spent between 50 to 61 percent of its total budget on its core functions.

* The Other category includes about \$36,000 of an unspent fund balance.

As Table 2 shows, we estimate that CJP could realize cost efficiencies equal to about 10 percent of its overall budget, or \$504,000. Most of these savings would come from addressing the second largest administrative cost in CJP's budget: its rent payment for an oversized office space in San Francisco. Despite the fact that it has only 22 staff members, CJP currently rents a 13,000-square-foot office space in central San Francisco, equating to 600 square feet per person. Based on guidance from the Department of General Services (DGS), we estimate that it could reduce the amount of space it rents by more than half, to about 6,100 square feet. This estimate takes into consideration the room CJP would need to store some files and hold commission meetings.

Table 2
By Changing Its Current Operations, CJP Could Repurpose About 10 Percent of Its Budget

COST CATEGORY	COST IN FISCAL YEAR 2017-18	CHANGE TO CURRENT OPERATIONS	ESTIMATED NEW ANNUAL COST	TOTAL ANNUAL SAVINGS
Lease	\$704,000	Relocate CJP's Office CJP could relocate from its current 13,000-square-foot office space in San Francisco to a 6,100-square-foot office space in another part of the Bay Area, such as Oakland.	\$268,000	\$436,000
Legal Research Library	50,000	Use Electronic Legal Resources CJP maintains both hard-copy and online access to legal research resources. CJP could rely on online access instead of also maintaining paper copies.	13,000	37,000
Telephone Service	18,000	Switch Telephone Providers CJP could switch to an online telephone service provider.	3,000	15,000
Commissioner Expenses	40,000	Reduce Lodging Costs San Francisco has the highest allowance in the State for government lodging rates at \$250 per night. In fact, the commissioners' lodging rates were higher than the allotted rate about 25 percent of the time during fiscal year 2017-18. By relocating, CJP could host commission meetings in a location with less expensive hotels, such as Oakland, while still providing easy access to an airport for commissioners traveling from out of town.	28,000	12,000
Courier Costs	4,000	Eliminate Mailing CJP could transition to a paperless system, as other states have done, and purchase electronic devices for each commissioner, which would eliminate the paper-dense mail packages and the courier fees it incurs for approximately seven meetings a year.		4,000

\$504,000 is 10% of CJP's \$5.2 million budget  **\$504,000**

Source: Analysis of CJP's fiscal year 2017-18 expense data, documents regarding its operations, and documents to determine estimated new annual costs.

Additionally, when we compared the costs for CJP's office space with the costs for other state-owned properties around the State, we found that San Francisco has one of the highest costs per square foot for the rental of state-owned office space. CJP currently pays \$4.37 per square foot, for a total of more than \$700,000 in annual rent after factoring in additional lease costs, such as the lease management fee it pays DGS. Because CJP would risk losing some of its staff if it relocated a substantial distance from its current location, we reviewed the costs for other state-owned buildings in the Bay Area. We found that CJP could relocate to a building in Oakland at a rate of \$3.67 per square foot each month—a cost that is comparable to some DGS office buildings in Sacramento and Los Angeles. However, before it moves to a new location CJP will need to work with DGS to identify a new tenant or negotiate a mutual termination of the lease to avoid being responsible for the rent at its current space.

Although CJP's director shared many benefits that he believes CJP's current location provides—including convenient access to the Judicial Council and the Supreme Court—he also acknowledged that a move to a location such as Oakland would not be as difficult as a move to a more distant location, such as Sacramento. The supervising administrative specialist expressed concern that CJP would not be able to recoup the financial savings from relocating to a less costly space because the Legislature might reduce its budget allocation accordingly. However, we believe that CJP could demonstrate to the Governor and the Legislature that the State would benefit from allowing CJP to allocate the savings to its other areas of need.

By modernizing and automating some of its processes, CJP may recognize efficiencies in the amount of time staff spend responding to complainants.

We believe that CJP could realize additional savings from our proposed changes to its operations. For example, by modernizing and automating some of its processes, CJP may recognize efficiencies in the amount of time staff spend responding to complainants. Staff currently respond to each complainant with a mailed letter to acknowledge CJP's receipt of the complaint. However, if CJP enabled online complaint submissions, it could send such letters to the complainants' email addresses automatically within seconds of their submissions. Over time, these changes in processes could allow CJP to more efficiently allocate resources directly to its core functions. CJP's director acknowledged that CJP would be interested in modernizing its operations and expressed a commitment to doing so, as long as it has the resources to implement the changes properly. We discuss its need for additional resources in the next section.

To Improve Its Efficacy, CJP Will Need Additional Resources

For CJP to implement the modernization efforts we describe in this chapter and to address the issues we discuss in Chapter 1, it will require an initial, one-time legislative allocation of \$419,000, as Table 3 shows. Should the Legislature choose to provide this funding increase, it would enable CJP to hire an investigations manager to ensure that investigative attorneys adequately implement the recommendations we include in Chapter 1, and to purchase and implement a new case management and filing system. The investigations manager may represent an ongoing cost, but to accurately estimate its related funding needs, CJP must first define the position and determine if it is full time. CJP should annually report to the Legislature its progress in filling and evaluating this position. Implementing a new case management and filing system represents a one-time cost that would allow CJP to realize efficiencies that would result in long-term cost savings. Other states' judicial discipline commissions that have modernized their practices, such as New York and Washington, have realized cost savings from doing so.

Table 3
The Legislature Should Make an Immediate One-Time Allocation of \$419,000 to CJP

FISCAL YEAR	REASON FOR INCREASE	COST OF CHANGE
2019–20	Limited-Term Full-Time Investigations Manager (salary and benefits)	\$221,000
	Transition to a new case management and filing system*	198,000
Total new funding		\$419,000

Source: Analysis of CJP's budget, expenditures, and staffing, as well as assessment of the potential impact from the California State Auditor's recommendations.

* We have included \$110,000 for CJP to keep its contract with the external consultant who maintains its existing case management system during the next year while CJP transitions to its new system.

During the audit, CJP claimed that resource constraints can impede its ability to more fully meet its mission by limiting the steps it takes in investigations. Further, according to the supervising administrative specialist, since 2013 CJP has submitted four budget change proposals seeking additional staff. However, she also acknowledged that CJP has not performed a comprehensive internal review of its operations or expenditures to ensure that it is operating efficiently. If CJP had performed this kind of review, it likely could have reallocated 10 percent of its budget to additional staff resources,

as we previously show. Texas law requires its judicial discipline commission to periodically assess its operations and implement any improvements needed to increase efficiency. We believe CJP should adopt a similar periodic review process to ensure its continued efficiency. By performing regular evaluations of its spending practices, CJP could optimize the amount of funding available for the activities that advance its mission.

At the same time, the recommendations we make throughout this report have the potential to increase CJP's workload. In particular, we anticipate that a likely effect of expanding CJP's accessibility to the public will be an increased number of complaints about judges. For instance, Washington's judicial discipline commission informed us that after it transitioned to online complaint submission, it observed a 30 percent increase in the number of complaints it received. Moreover, to facilitate its management of a new case management system, CJP may find it necessary to fill its long-vacant IT manager position. In upcoming years, CJP will need to examine its systems and processes in light of any workload increases to ensure that it effectively uses the resources at its disposal. If, after CJP maximizes its current resources, it finds that it still cannot effectively fulfill its mission, it should annually report its additional needs to the Governor and the Legislature for at least another three budget years. Its reports should include its progress in implementing our recommendations, realized cost savings, and any budgetary needs it has because of changes to its operations.

Recommendations

Legislature

To better ensure that those who observe or experience judicial misconduct realize that they can report it to CJP, the Legislature should require that all courthouses publicly display information that CJP prepares and provides that clearly and concisely presents CJP's mission, its process for submitting a complaint, and the definition of judicial misconduct.

To make certain CJP has the resources necessary to implement our recommendations and to realize budget efficiencies, the Legislature should make a one-time appropriation to CJP of \$419,000 in the Budget Act of 2019. This appropriation should be specifically for CJP to hire a limited-term investigations manager and update its electronic case management system.

CJP

To improve its transparency and accessibility to the general public, CJP should do the following by April 2020:

- Implement a plan to regularly engage in outreach activities that target the general public.
- Update its website to include better resources for complainants, including examples of high-quality complaints that illustrate what CJP looks for when evaluating a complaint to decide if it will open an investigation.

To ensure that it expeditiously improves the public's ability to submit complaints, CJP should begin accepting complaints online upon updating its electronic case management system.

To improve public transparency and offer opportunities for the public to provide testimony on its proposed rules and operations, CJP should hold at least one public meeting during its biennial rulemaking process. It should ensure that it properly notifies the public about the meeting and provides the public the opportunity to comment at the meeting.

To maximize the resources available for its core functions, CJP should immediately begin exploring options for relocating its office to a less expensive location and relocate as soon as possible.

To ensure that it obtains the resources necessary to fulfill its mission, CJP should report to the Legislature by May of each of the next three years about the following:

- Its progress in implementing our recommendations and any associated effects on its workload.
- The steps it has taken to realize efficiencies in its operations.
- Its evaluation of whether the investigations manager is a full-time position and any funding it will need in the future to support that position.
- Its progress in purchasing and implementing a new electronic case management system.
- Its progress in relocating its office space to a more affordable location.
- Any savings or unforeseen costs arising from the changes we identify above.

We conducted this audit under the authority vested in the California State Auditor by Government Code 8543 et seq. and according to generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives specified in the Scope and Methodology section of the report. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Respectfully submitted,

A handwritten signature in black ink that reads "Elaine M. Howle". The signature is written in a cursive, flowing style.

ELAINE M. HOWLE, CPA
California State Auditor

Date: April 25, 2019

Appendix A

SCOPE AND METHODOLOGY

The Joint Legislative Audit Committee (Audit Committee) directed the California State Auditor to examine CJP's policies and practices for investigating complaints against judges and issuing judicial discipline, as well as to provide an overview of CJP's operations. Table A lists the objectives that the Audit Committee approved and the methods we used to address them.

Table A
Audit Objectives and the Methods Used to Address Them

AUDIT OBJECTIVE	METHOD
1 Review and evaluate the laws, rules, and regulations significant to the audit objectives.	Reviewed and evaluated relevant laws and rules, including historical changes to the California Constitution.
2 Describe the standards CJP uses and the process it follows in determining the disposition of its cases and how it ensures that the standards are consistently followed. Determine who within CJP makes the decision as to whether an alleged violation of the ethics code meets the clear and convincing criteria. Assess CJP's complaint review process to ensure it is meeting its mission and complying with all applicable statutes, policies, and regulations. Determine whether CJP uses the same criteria at all stages of the complaint process and is taking an appropriate and reasonable course of action for the complaints it reviews and for determining the disposition of each complaint.	<ul style="list-style-type: none"> • Documented and assessed CJP's standards and processes and evaluated whether those standards and processes comply with relevant criteria, are reasonable, and have adequate internal controls. We focused our review on complaints submitted against judges and former judges because we noted the complaint process for subordinate judicial officers is comparable to that for judges and former judges. • Reviewed case law and determined the commission uses the clear and convincing standard when evaluating whether misconduct occurred. • Randomly selected and reviewed 40 complaints that CJP closed at the intake stage during fiscal years 2013–14 through 2017–18. We stratified our selection based on fiscal year and closing reason code. We used these cases to assess whether CJP consistently applied its policies to address this objective and several others below. • Randomly selected and reviewed 30 cases that CJP completed investigating during fiscal years 2013–14 through 2017–18. We stratified our selection based on fiscal year and the level of discipline imposed, if any. We used these cases to determine whether CJP complied with its policies to address this objective and several others below. • Because CJP investigators did not document investigation strategies, evaluated the 30 investigated cases to determine whether CJP investigators took all reasonable steps to evaluate allegations of misconduct. • Evaluated whether correlations exist between the misconduct type and the final discipline, and found no direct, consistent relationships between misconduct type and final discipline.
3 Describe the standards CJP uses to determine whether or when to contact complainants, witnesses, and judges. For the last five years, determine the percentage of cases when CJP contacted any of these parties as part of an investigation of a complaint.	<ul style="list-style-type: none"> • Documented CJP's standards and practices for contacting complainants, witnesses, and judges. • Used CJP's case management system to determine the percentage of cases in which CJP contacted judges during an investigation. Determined the percentage of cases when CJP contacted complainants and witnesses during intake and investigations by assessing 70 intake and investigation files.

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AUDIT OBJECTIVE	METHOD
<p>4 Determine when judges are notified about a complaint and whether they are informed of the nature and basis of the complaint and when they will be provided an opportunity to respond.</p> <p>Determine what information from CJP's investigation is provided to the judge and why certain facts may be withheld by CJP.</p> <p>In addition, review CJP's process to determine whether judges receive due process from complaint to resolution.</p>	<ul style="list-style-type: none"> • Documented CJP's policies and practices for notifying judges of complaints and assessed the information CJP shared with judges in the 30 investigated cases we reviewed to determine whether CJP gave judges an appropriate level of detail about the complaints and whether it gave the judges an adequate opportunity to respond. We also determined what information CJP withheld from the judges and why. • Documented when CJP granted extensions for the 30 cases we reviewed. • Evaluated CJP's structure and disciplinary process by comparing them to best practices for providing due process as part of overseeing judicial conduct.
<p>5 Assess CJP's process for evaluating the credibility of evidence, witnesses, and statements made. Furthermore, do the following:</p> <p>a. Determine whether CJP considers evidence that would be inadmissible under state law and how it treats hearsay evidence in its consideration of a case.</p> <p>b. Determine whether the commission meets or observes witnesses.</p> <p>c. Determine the circumstances in which the commission would have the authority to alter the findings of fact and conclusions of law made by the special masters who do observe witnesses.</p>	<ul style="list-style-type: none"> • Documented CJP's process for evaluating evidence, including hearsay evidence, inadmissible evidence, witnesses, and other statements. Determined that the commission did not preside over evidentiary hearings and therefore did not observe witnesses on its own. • Reviewed case law to determine the commission's process for evaluating and accepting the findings of fact and conclusions of law developed by the special masters. • We did not reweigh or determine the admissibility of evidence provided to the commission because this is a matter of judicial discretion. • For the five cases that completed formal proceedings during our audit period, compared the findings and conclusions from the special masters to the final disciplinary order. We documented reasons for discrepancies.
<p>6 Determine what complaint information is provided to the commission and when it is provided.</p> <p>Assess whether the level of detail is sufficient for the commission to make disciplinary decisions.</p>	<ul style="list-style-type: none"> • Documented CJP's process for providing information to the commission, including what information staff provide and when. • Reviewed 70 cases and determined whether the information provided to the commission was accurate and sufficient for it to make decisions about the case disposition.
<p>7 Describe the stages in the complaint process at which staff attorneys provide recommendations to the commission and what form they take. For the last five years, determine the number of staff recommendations that were adopted or rejected by the commission and what types of decisions are made by staff as opposed to the commission.</p>	<ul style="list-style-type: none"> • Documented and assessed CJP's process for providing recommendations to the commission. • Reviewed meeting memos and minutes to determine how often the commission disagrees with staff recommendations on the closure of cases or final discipline of the judges.
<p>8 Assess whether staff, attorneys, and commissioners have the proper training, qualifications, and experience to review complaints.</p> <p>In addition, determine the size and composition of CJP's staff and analyze whether the staffing level, training, and qualifications are appropriate for its mission.</p>	<ul style="list-style-type: none"> • Assessed the materials that CJP provides to its staff and commissioners as part of their on-the-job trainings or orientations to ensure that key concepts and standards are consistent. • Evaluated the resumes of CJP's attorneys and staff and assessed whether they met the minimum qualifications for their positions. We documented their years of experience prior to CJP hiring them and compared the minimum/desirable qualifications, responsibilities, and pay to comparable attorney positions for state agencies. Because government leaders appoint commissioners, we documented the current commissioners' years of experience prior to appointment. • Assessed whether the size and composition of CJP's staff is appropriate by analyzing CJP's operations.

AUDIT OBJECTIVE	METHOD
<p>9 For formal proceedings, determine whether CJP employs in-house trial attorneys or outside prosecutors, such as attorneys from the Office of the Attorney General. Identify the qualifications, responsibilities, and pay for these trial attorney positions. In addition, compare the costs of employing both types of attorneys and assess whether CJP has a process for determining which type of attorney to use.</p>	<ul style="list-style-type: none"> • Documented and assessed CJP's contracts for outside trial counsel employed during our audit period, including the procurement process, and, to the extent possible, compared the cost, qualifications, and responsibilities of the outside trial counsel to the in-house trial counsel. • Confirmed that CJP no longer intends to use outside trial counsel and therefore does not have a process for choosing in-house or contracted trial counsel.
<p>10 Review and evaluate CJP's confidentiality rules and the rationale for keeping any type of inquiry or investigation confidential.</p>	<p>Documented and assessed CJP's confidentiality rules and confirmed that its rationale for confidentiality is protecting the public and judicial officers. We assessed whether this rationale is reasonable and applies to appropriate documents by comparing CJP's confidentiality rules to those of similar organizations, such as the Medical Board, the State Bar, and comparable judicial discipline commissions in other states.</p>
<p>11 Review and evaluate CJP's process for investigating legal error and determine the following:</p> <ol style="list-style-type: none"> a. How often CJP investigates legal error. b. The standards CJP uses for determining whether a complaint is one of legal error. c. Whether the process protects against discipline being imposed for legal error. d. CJP's process for investigating complaints where there is not clear legal precedent as to whether or not a judge's conduct violates the ethics code. 	<ul style="list-style-type: none"> • Documented and assessed CJP's processes and standards for investigating legal error for the 70 cases we reviewed. • Attempted to use CJP's data to determine the number of times that complaints involved legal error and the number of times that complaints were closed because of legal error, but determined that because of its imprecise coding, CJP's data do not consistently identify all relevant allegations of legal error. However, we used the available data to identify five judges with complaints closed because of legal error and evaluated whether any patterns, such as demographics of the complainants, might indicate that the legal error was linked to judicial misconduct. • Interviewed the legal advisor on CJP's process for investigating complaints when no clear legal precedent exists and assessed CJP's process for the one case we selected in which CJP determined that there was no legal precedent.
<p>12 During the most recent five-year period, determine the number of cases, case-processing times, and case outcome within each stage of CJP's discipline process. Further, evaluate the outcomes of a selection of cases and the discipline imposed by the commission, including cases that resulted in private discipline.</p>	<ul style="list-style-type: none"> • Used data to determine the number of cases, case-processing times, and case outcomes at each stage. • Reviewed 30 cases of public or private discipline to evaluate whether CJP supported its final disciplinary decisions and consistently followed its processes.
<p>13 For the most recent five-year period, assess CJP's budget, expenditures, and fund balances. Further, determine whether CJP's budget for administration and staffing, as well as the average cost of an inquiry or investigation, are consistent with best practices of other comparable organizations.</p>	<ul style="list-style-type: none"> • Used data from its budget system to assess CJP's budget and expenditures—including for administration and staffing—and fund balances from fiscal years 2013–14 through 2017–18. • The fact that CJP's case management system does not track the hours spent on a case and that CJP does not require its staff to track their time on investigations hindered our ability to develop a precise estimate of cost per investigation. CJP completed 158 investigations in fiscal year 2017–18. Using the salaries of CJP investigators and assuming that the investigators' time on these investigations was spent in that fiscal year, we determined that the average cost of an investigation was \$7,900. However, as we explain in Chapter 1, the time investigators spend on cases can range over one year. • Compared CJP's budget, expenditures, fund balances, and the average cost of an investigation to those of other judicial discipline commissions and comparable entities. With regard to the average cost of an investigation, we were hindered from comparing CJP to other similar entities because of the imprecision of the cost estimate we developed for CJP's investigations and the limited information we could identify for other organizations. • Documented and assessed the risks posed by CJP's outdated case management system and the costs to replace the system.

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AUDIT OBJECTIVE	METHOD
14 For a selection of cases, determine whether CJP provided all parties, including the judge who was the subject of the complaint, an opportunity to respond with relevant information and to challenge a disciplinary decision if warranted. Further, determine whether and why judges have to sacrifice confidentiality to challenge the commission's disciplinary decisions.	<ul style="list-style-type: none"> Reviewed 30 cases and evaluated whether CJP followed its processes for communicating with judges and complainants about allegations of misconduct. Assessed when CJP's processes may require judges to choose between confidentiality and appealing a disciplinary decision.
15 Review and evaluate CJP's process for reviewing past complaints concerning a judge and how this information is used when investigating a judge should subsequent complaints be filed. Further, determine CJP's record retention policies for past complaints and outcomes against a judge and whether CJP consolidates multiple complaints.	<ul style="list-style-type: none"> Reviewed 30 cases and evaluated whether CJP consistently considers past complaints during investigations and when determining the disposition of complaints. Documented CJP's record retention policy and assessed it for reasonableness by reviewing the justification for its recent policy change. Assessed CJP's processes for consolidating complaints in the 30 investigated cases we reviewed.
16 Over the past five years, determine the number of cases in which a judge was publicly admonished, censured, or removed after having prior admonishments, advisory letters, or complaints closed either with or without investigation. In addition, determine the number of complaints that did not receive a full investigation during the same time period.	<ul style="list-style-type: none"> Used CJP's case management data to determine the number of cases in which CJP publicly admonished, censured, or removed judges after it had previously issued private or public discipline or closed prior complaints without investigation or discipline. Determined how many complaints CJP closed at the intake stage.
17 Determine whether CJP has a process for expediting and deferring complaints. If so, for the past five years, determine the number of complaints expedited or deferred and the reasons for each.	<ul style="list-style-type: none"> Documented CJP's process for expediting or deferring complaints. Reviewed CJP's case management data and identified the number of instances in which commissioners deferred cases. Interviewed the legal advisor and reviewed 30 investigated cases to determine reasons why CJP may defer cases. Reviewed 30 investigated cases and determined how often the commission expedited a complaint.
18 To the extent possible, determine if there are disparities in investigation rates, discipline rates, and budget efficiencies between CJP and similar judicial commissions in other states.	<p>Compared CJP's investigation rates, discipline rates, and budget information with those of the judicial discipline commissions from New York, Washington, and Texas. We chose these states for comparison based on factors such as their statewide population, number of judicial officers, disciplinary options, overall budget, and burden of proof. We spoke to the directors from each of these judicial discipline commissions to learn more about their complaint review processes and operations, and we then used each state's public annual report to compare the requested data to CJP's.</p>
19 Review and assess any other issues that are significant to the audit.	<ul style="list-style-type: none"> The start of this audit was delayed by almost two years due to litigation with CJP. To ensure CJP did not alter records during this delay, after the litigation was settled, we tested the completeness of CJP's files using complaint records directly forwarded to us by the public and found no issues. We performed additional work for some of these complaints and either identified no problems with the steps CJP took in response to the complaints or determined that we had generally identified the same issues in other areas of our work. Evaluated the availability of transcripts and recordings in different types of court cases for four superior courts. Reviewed data trends to determine if any risks for bias against particular judges or courts may exist and did not identify any concerning trends. Evaluated CJP's transparency, outreach, and public accessibility. Used CJP's case management data to assess the relationship between the type of complainant and the level of investigation CJP conducts.

Source: Analysis of the Audit Committee's audit request number 2016-137 and information and documentation identified in the table column titled Method.

Assessment of Data Reliability

The U.S. Government Accountability Office, whose standards we are statutorily required to follow, requires us to assess the sufficiency and appropriateness of computer-processed information that we use to support our findings, conclusions, and recommendations. In performing this audit, we obtained data from CJP's case management system to calculate statistics on complaints against current and former judges. Additionally, we obtained CJP's budget system data and payroll data to identify CJP's annual budget, expenditures, and staff salaries. To evaluate these data, we performed electronic testing of the data, reviewed existing information about the data and systems, and interviewed agency officials knowledgeable about the data. We found that CJP's case management, budget, and payroll data were sufficiently reliable for these audit purposes.

However, during our review we identified a limitation with CJP's complaint data. Specifically, as we discuss in Chapter 1, we found that CJP imprecisely records allegations in its complaint data, often using one code to group allegations of legal error with other complaints that do not allege any legal error. As a result, we found the complaint data were not sufficiently reliable for determining the number of allegations of legal error. Although this determination may affect the precision of some of the numbers we present, there is sufficient evidence in total to support our findings, conclusions, and recommendations.

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Appendix B

ADDITIONAL INFORMATION ABOUT CJP

We identify our areas of concern with CJP's processes and operations, as well as our recommendations for improvement, in the chapters of this report. In this appendix, we provide answers to questions that the Audit Committee asked us to address that we do not address in the chapters. We present this independently verified information about CJP in a question-and-answer format to further inform the Governor, Legislature, and public about an organization that has never before been the subject of an external review.

CJP's Compliance With Legal Requirements

Question 1: *Is CJP complying with the statutes and regulations applicable to its review of complaints about judicial misconduct?*

Answer: We have minimal concerns regarding CJP's compliance with state law and regulations because very few statutes apply directly to CJP's review of complaints about judicial misconduct. State law exempts judicial branch entities, including CJP, from having to adopt regulations. However, the California Constitution does require CJP to create rules to govern its investigations, and we found that CJP has complied with the rules that it has created.

CJP's Interactions With Complainants, Witnesses, and Judges

Question 2: *When does CJP contact complainants?*

Answer: CJP contacts complainants by a letter to inform them that it has received the complaint. It also sends complainants a letter when it closes a complaint either with or without discipline. Sometimes CJP will contact the complainant during intake or investigations to understand their allegations or request information.

Question 3: *When and how does CJP decide whether it will contact judges?*

Answer: CJP does not contact judges for investigations if it determines there is no basis for further proceedings. For example, CJP may disprove the allegations. If CJP concludes that an allegation is not unfounded, it contacts the judge through a formal, mailed letter. The letter informs the judge of the relevant allegation and requests a response. Based on our review of 30 investigations, CJP frequently sends this letter near the end of an investigation.

CJP also mails a letter notifying a judge of intended discipline. If this discipline involves an intended public or private admonishment, the judge has the option to appear before the commission to object to the disciplinary decision or demand formal proceedings. CJP also communicates with the judge and the judge's attorney when negotiating settlements. Finally, a judge and/or the judge's attorney can appear before the commission at a public hearing at the end of the formal proceedings process, as Figure 5 on page 12 in the Introduction shows.

Question 4: *What information does CJP provide judges when it contacts them?*

Answer: In 21 of the 30 investigation cases we reviewed, CJP contacted the judges involved. In those cases, the letters that CJP sent always informed the judges about the specific nature of the allegations, their right to reply, their right to an extension, and the reasons that the behavior in question—if true—would constitute misconduct. To protect the complainant, CJP also took care not to reveal the complainants' identities. Based on our review, CJP provided sufficient details to allow the judges or their attorney to respond to the allegations.

Question 5: *How often did CJP contact judges, complainants, and witnesses during the five years of the audit period?*

Answer: Of the more than 800 cases investigated between fiscal years 2013–14 through 2017–18, CJP contacted judges in about 430 of those cases or 53 percent of the time. CJP cannot contact judges during the intake stage. CJP's data do not track how often it contacts complainants and witnesses. Thus, Table B.1 shows the number of times CJP contacted complainants and witnesses from fiscal years 2013–14 through 2017–18 in the cases we reviewed.

Table B.1

CJP Contacts Relevant Parties More Frequently During Its Investigation Stage Than During Its Intake Stage

Parties CJP May Contact	INTAKE STAGE			INVESTIGATION STAGE		
	NUMBER OF CASES IN WHICH CJP COULD HAVE CONTACTED THE PARTY*	NUMBER OF CASES IN WHICH CJP CONTACTED THE PARTY	PERCENTAGE OF CASES IN WHICH CJP CONTACTED THE PARTY	NUMBER OF CASES IN WHICH CJP COULD HAVE CONTACTED THE PARTY*	NUMBER OF CASES IN WHICH CJP CONTACTED THE PARTY	PERCENTAGE OF CASES IN WHICH CJP CONTACTED THE PARTY
Complainant	62	18	29%	22	9	41%
Witnesses	21 [†]	9	43%	29	23	79%

Source: Analysis of 70 cases CJP closed from fiscal years 2013–14 through 2017–18, 30 of which CJP investigated.

* For the purposes of this analysis, we excluded from the intake and investigations columns cases in which contacting some of the parties would not have been possible. For example, we excluded anonymous complaints as well as complaints CJP opened using its oversight authority.

[†] During the intake phase, CJP attorneys may contact only the complainant's attorney as a witness.

Question 6: *Does CJP give judges adequate time to respond during investigations and does it grant extensions?*

Answer: We found that in the cases we reviewed in which CJP contacted judges, it provided ample time for the judges to respond. Additionally, judges—sometimes through their attorneys—almost always filed responses to CJP’s allegations. CJP’s rules provide judges 20 days to respond and allow them to request an extension if they need more time. In the cases we reviewed, judges frequently requested extensions, and CJP almost always granted them. We noted only two cases in which CJP denied judges’ additional extension requests after it had already provided them extensions. In the 30 investigation cases we reviewed, the total time of extensions to respond ranged from seven days to 95 days.

CJP’s Review of Complaints and Issuance of Discipline

Question 7: *How long does it take CJP to review complaints?*

Answer: Table B.2 shows the average months between CJP receiving a complaint and closing a complaint for categories of complaints closed by outcome.

Table B.2

The Length of Time Between Complaint Receipt and Closure Is Dependent on the Complaint Outcome
Fiscal Years 2013–14 Through 2017–18

Complaint Outcome	TOTAL NUMBER OF COMPLAINTS CLOSED	AVERAGE NUMBER OF MONTHS BETWEEN RECEIPT AND CLOSURE
Closed Without Investigation	5,143	2 months
Closed After an Investigation With No Discipline	610	12 months
Closed After an Investigation With Discipline	198	18 months

Source: Analysis of data from CJP’s case management system.

Note: These numbers represent consolidated complaints. CJP closed more than 7,400 unique complaints over this time period.

Question 8: *How often does CJP expedite or defer complaints?*

Answer: In the 30 investigation cases we reviewed, we identified two instances in which CJP expedited complaints. CJP expedited one complaint because it maintains a practice of expediting complaints that presiding judges submit and the case file records did not explain why it expedited the other.

Out of the more than 800 complaints it investigated and closed during fiscal years 2013–14 through 2017–18, CJP deferred 65. The legal advisor stated that CJP primarily defers complaints to protect the integrity of judicial decisions in the underlying cases. In other words, if CJP started investigating judicial misconduct while a complainant's case with that judge was ongoing, CJP's investigation could unduly influence the case. Additionally, CJP may defer complaints because cases are under review by appellate courts or because it does not want to influence related investigations or proceedings.

Question 9: Does CJP consolidate complaints?

Answer: CJP consolidates complaints at times. According to the supervising administrative specialist, if it receives multiple complaints against a judge that contain similar allegations, CJP consolidates those complaints into a single case. Moreover, she stated that if CJP receives multiple individual complaints against a judge regarding different matters, it sometimes consolidates those complaints. The supervising administrative assistant stated that CJP cannot consolidate complaints that involve different judges. We observed that CJP followed these practices for the complaints that we reviewed.

Question 10: Does the commission receive sufficient information for it to make decisions and what information does it receive?

Answer: The commission generally receives sufficient information in memos or reports that CJP's attorneys prepare for each case and at each stage in the complaint review process. Each memo at the intake and investigation stages includes a summary of the allegations, prior discipline if applicable, legal analyses that CJP's attorneys have developed, and recommendations. Memos also include background on the judge, such as the judge's age and years of service, and may include prior complaints that the attorneys have determined are relevant to the current allegations. During the investigations we reviewed, the attorneys generally also included the steps that they took and any other allegations they discovered. Although we identified minor issues in six of the 70 intake and investigation memos we reviewed—such as the memos not specifically mentioning certain allegations—it is unclear whether these isolated issues affected the commission's decisions in the broader context of multiple allegations and complex investigations.

Additionally, the commission receives briefs during formal proceedings from CJP's trial counsel and the judge's attorney, as well as the report from the special masters. These reports include adequate information to understand each party's perspective

on the findings and conclusions related to each allegation of misconduct. The commissioners also have access to CJP's full files during their meetings and memos from the legal advisor.

Question 11: *Does CJP support the disciplinary outcomes of its cases?*

Answer: Yes. In the 19 cases of private admonishment and 11 cases of public admonishment that we reviewed, we found that the commission supported the disciplinary decisions it made. The commission's policy declarations state that in determining the appropriate level of discipline for a case, it will consider several factors related to the characteristics of the misconduct and the service and demeanor of the judge. Ultimately, the commission has the discretion to determine which of these factors are applicable to a case.

Question 12: *What does CJP do if it receives a complaint for which there is no clear legal precedent as to whether the judge violated the ethics code?*

Answer: We observed one case in which CJP investigated conduct that was not clearly defined as unethical by any legal or commission precedent. According to the investigator, the question at hand concerned whether a judge should have recused themselves from a case in which it may have appeared the judge had a vested interest. Although the intake attorney believed that the alleged conduct might have been improper, the investigator concluded that a lack of precedent existed to make this determination. The commission closed the matter and referred it to the California Supreme Court Committee on Judicial Ethics Opinions (ethics committee) for an opinion. The ethics committee is a panel of judicial officers that is authorized to provide advisory opinions on questions of judicial ethics but that cannot issue discipline. The ethics committee later issued guidance on its website that advised judges to avoid the behavior alleged in this particular case.

Question 13: *What is the commission's process for handling hearsay evidence?*

Answer: Hearsay evidence is evidence of a statement that was made by someone other than the witness who is testifying at the hearing and that was offered to prove the truth of the matter asserted. CJP's rules require that the California Evidence Code apply to all hearings before the commission or the special masters. The California Evidence Code states that except as provided by law, hearsay evidence is inadmissible. As a result, CJP process and rules would not allow it to admit hearsay evidence in its consideration of a case unless the law permits it to do so.

Question 14: Does CJP's process protect against it issuing discipline for legal error?

Answer: Yes. CJP's rules prohibit it from imposing discipline for legal error alone. To impose discipline on a judge who has committed legal error, CJP must also demonstrate by clear and convincing evidence that the legal error resulted from judicial misconduct, such as racial bias. In our review of six cases in which judges received discipline for cases involving legal error, we found that CJP did not issue discipline for only legal error and that other judicial misconduct was present.

Question 15: Do judges have to sacrifice confidentiality to challenge disciplinary decisions?

Answer: Judges have to sacrifice confidentiality in some circumstances. Specifically, judges sacrifice confidentiality when they ask the Supreme Court to review a private advisory letter that was issued by the commission. However, these advisory letters are the lowest form of discipline, and in addition to the judge's right to ask the Supreme Court for review, CJP's rules provide judges an opportunity, when they believe it is necessary, to request that the commission make factual or legal corrections to those letters within 30 days of its mailing to the judge. Unless judges ask the Supreme Court for review, advisory letters remain confidential.

Judges can challenge intended private or public admonishments without sacrificing confidentiality by requesting to appear before the commission in a closed session to object to the intended discipline. By appearing before the commission, judges waive their right to formal proceedings and a review by the Supreme Court. Alternatively, judges can demand that matters go through formal proceedings, which is a public process that the commission can also initiate. Judges can challenge the commission's decision to retire, remove, censure, or admonish them by petitioning the Supreme Court for review of their case. Judges who choose to do so after formal proceedings do not sacrifice confidentiality because formal proceedings are already open to the public.

Finally, we determined that CJP never initiated formal proceedings followed by a private admonishment, meaning that CJP never disclosed allegations of misconduct to the public and then issued private discipline.

CJP's Trial Counsel

Question 16: *Does CJP use in-house or contracted trial counsel for formal proceedings?*

Answer: CJP hired an individual as trial counsel in 2015. Before hiring him, CJP contracted with two individuals to act as trial counsel for its formal proceedings.

Question 17: *What are the qualifications and responsibilities for CJP's trial counsel position?*

Answer: The minimum qualifications that CJP established for its trial counsel position included membership in the State Bar, at least eight years post-bar experience, and substantial criminal or civil trial experience. Further, CJP listed appellate experience as a desirable qualification. CJP hired an individual with State Bar membership and 18 years of substantial trial experience, including appellate experience, for its trial counsel position. Trial counsel serves as examiner in the trial phase of commission proceedings, which includes presenting evidence that supports charges brought by the commission and responding to the evidence and witnesses introduced by respondent judges. Trial counsel also handles post-hearing appearances before the commission and represents the commission in any review by the Supreme Court.

Question 18: *What are the comparative costs associated with CJP maintaining in-house trial counsel versus using contracted trial counsel?*

Answer: The average costs varied greatly between its two contracts for external trial counsel. Although one contractor cost CJP an average of less than \$5,000 monthly, the other cost an average of more than \$18,000 monthly. CJP's current in-house trial counsel costs an average of \$20,000 each month. Regardless of the cost, CJP retaining in-house trial counsel is likely more effective than contracting for this service. In-house trial counsel has a better opportunity to develop expertise in CJP's processes and proceedings, which are unique. Additionally, an increase in formal proceedings over the last three years also justifies CJP using an in-house expert because that expertise can allow in-house trial counsel to manage these cases more efficiently than contracted trial counsel.

Question 19: Does CJP have a process for determining whether to use in-house or contracted trial counsel?

Answer: No. The supervising administrative specialist stated that CJP has no plans to use contracted trial counsel again and therefore does not have or need a process for deciding when to choose in-house or contracted trial counsel.

CJP's Operations

Question 20: What is CJP's record retention policy for complaints and outcomes against judges?

Answer: CJP's policy is to retain all files related to cases for which it has issued discipline. Its policy is to retain files for those cases closed without discipline for 13 years for municipal judges, superior court judges, and subordinate judicial officers, and to retain these files for 19 years for appellate or Supreme Court justices. Based on our review, this policy is reasonable.

Question 21: Is CJP's confidentiality policy reasonable?

Answer: Yes. CJP has established reasonable confidentiality rules that it states are intended to protect the confidentiality of complainants and witnesses and to protect judges from damage to their reputations from unfounded complaints. CJP's confidentiality rules are generally comparable to the practices of the other disciplinary entities we reviewed, including the New York, Washington, and Texas judicial discipline commissions, the State Bar, and the Medical Board.

Question 22: Do CJP's attorneys, commissioners, and staff have the proper training, qualifications, and experience to review complaints?

Answer: Yes. CJP's attorneys meet or surpass the minimum qualifications related to prior legal and courtroom experience for each of their classifications, with an average of 15 years legal experience before they joined CJP.

We compared CJP's attorney positions to similar positions in other state agencies and determined that CJP's attorney qualifications are generally comparable. The supervising administrative specialist stated that the director guides new attorneys through CJP's procedure manual and their positions'

respective manual—intake or investigations—and provides additional reading materials such as previous CJP decisions. She also stated that the director works with new attorneys on their first assignments, and that they attend the annual Association of Judicial Disciplinary Counsel conference.

The commissioners are appointed as members of the commission—three of whom must be judges, two attorneys with ten years of experience practicing law in the State, and six citizens who are not judges, retired judges, or members of the State Bar. There are no other qualifications specified in the California Constitution for the role of commissioner. Nevertheless, the commissioners had an average of 20 years of professional experience across diverse fields. The supervising administrative specialist told us that CJP provides an in-person new member orientation for commissioners. The orientation materials cover topics such as CJP’s background and governing authority, procedural overview, and determining misconduct. She also said commissioners attend the three-day National College for State Courts Center for Judicial Ethics conference biennially.

Although they do not review complaints, CJP administrative staff also meet or surpass the minimum qualifications for their positions.

A Comparison of CJP to Other States

Question 23: *How does CJP and its operations compare to other states?*

Answer: Table B.3 on the following page presents the data that we collected for informational purposes; however, because there were significant limitations in our ability to compare the states we reviewed, we determined that we could not use this information to support findings and conclusions in our report.

Table B.3
Fundamental Differences Make Comparing CJP's Data to Other States Imperfect

	CJP	NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT	TEXAS STATE COMMISSION ON JUDICIAL CONDUCT	STATE OF WASHINGTON COMMISSION ON JUDICIAL CONDUCT
Concerns About Comparisons*	Requires clear and convincing evidence that misconduct occurred. Issues private and public discipline.	Lower burden of proof for evidence than CJP. All disciplinary action is public.	Lower burden of proof for evidence than CJP. Issues private and public discipline.	Requires clear and convincing evidence that misconduct occurred. All disciplinary action is public.
Budget for Fiscal Year 2017–18	\$4,965,000	\$5,600,000	\$1,175,000	\$1,340,000
Authorized Staff Positions	24	41	14	9
Judges in State	1,800	3,150	3,800	550

Data Below From Calendar Year 2017

Complaints Received	1,670	2,140	1,535	440
Investigation Rates	9%	8%	41%	‡
Total Discipline Issued	39	16	51	5
Discipline Rates†	2%	1%	3%	1%
Public Discipline Rates	13%	100%	51%	100%
Private Discipline Rates	87%	Not Applicable	49%	Not Applicable

Source: Analysis of publicly reported data from CJP, New York, Texas, and Washington and the state laws for each commission.

* According to other states' annual reports, unlike in California, not all judges in New York and Texas are required to be lawyers, further precluding meaningful comparisons.

† For consistency across compared states, we calculated the discipline rates by dividing the total discipline issued by the complaints received.

‡ Because of differences in its reporting, we were unable to determine an investigation rate for Washington that would be comparable to those performed by CJP and other states' commissions.

April 2019



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April 10, 2019

Elaine M. Howle, CPA*
 California State Auditor
 621 Capitol Mall, Suite 1200
 Sacramento, CA 95814

Re: Audit of the Commission on Judicial Performance

Dear Ms. Howle:

On behalf of the Commission on Judicial Performance (CJP), this is in response to the draft audit report that we received on April 4, 2019.

Introduction: CJP fully cooperated with the audit, which found no problems with CJP's confidentiality policy, the amount of discipline CJP issues relative to other judicial disciplinary agencies, or the quality of CJP staff.

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At the outset, we note that CJP cooperated fully throughout the audit process. The audit confirmed the following important points. CJP has reasonable and appropriate confidentiality policies. There is no basis to conclude that CJP issues less discipline than similar agencies in other states. CJP commission members, attorneys, and staff have the proper training, qualifications, and experience to perform CJP's important work.

①
②

CJP responds to the audit report's specific recommendations, below.

Section I: CJP intends to implement the recommendations regarding improving its intake and investigation processes, and will be alert to potential due process issues raised by certain recommendations.

CJP intends to implement the recommendations in Section I of the report for its intake and investigation processes. In terms of detecting patterns of judicial misconduct, there are potential due process issues (to which CJP will pay careful attention) with basing new investigations on previously-closed complaints. This is especially the case where the perceived pattern has to do with legal error, as legal error does not constitute judicial misconduct.

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* California State Auditor's comments begin on page 83.

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April 10, 2019
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Section II: CJP does not need to take action on these recommendations, which are for the Legislature, but notes that its unitary system, like that of other public entities, comports with due process, and has been approved by the California Supreme Court.

④ The recommendations in Section II of the report are for the Legislature and do not require any action by CJP. We do, however, want to address some of the comments in Section II regarding CJP's unitary structure. Specifically, the California Supreme Court has consistently upheld the unitary structure of CJP as a judicial discipline agency in the face of due process and other challenges. The Supreme Court has made clear that CJP provides proper notice to judges of allegations against them and a sufficient opportunity to respond to those allegations. CJP thus provides adequate due process to judges involved in its proceedings. (*Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, 390-395.)

④ There has never been a successful challenge to CJP's structure and authority, including the time period from 1994 (when Proposition 190 passed) to the present. This history establishes that there is no problem, due process or otherwise, with CJP's current unitary structure. Moreover, there are many unitary public entities in California that have both investigative and adjudicative functions, including the Legislature itself and city planning commissions. As with CJP, the unitary structure of these entities does not violate due process. Finally, we note that there is no state that has a judicial discipline agency structured exactly like the one proposed in the audit report.

⑥ The analogy, on pages 4 and 49 of the audit report, that the commissioners are like a jury in a criminal case "being composed of detectives who investigated the case" is unfortunate, and simply wrong. Commissioners do not investigate cases, and are not at all like detectives. Investigating attorneys conduct investigations and report on the evidence to the commission. Commissioners do not communicate with investigating attorneys once they begin to adjudicate a case. The audit found no evidence that commissioners improperly considered allegations investigated, but not proven, when adjudicating cases, because there is no such evidence.

Section III: CJP intends to improve its transparency and modernize operations, but additional funds, beyond those recommended by the audit, may be required.

⑦ CJP intends to implement the recommendations in Section III of the audit report, regarding measures to improve transparency and modernize our operations. There are a few specific issues that we wanted to highlight. CJP would not be able to accomplish its work without our hardworking and dedicated non-attorney staff; we submit that the costs associated with our non-attorney staff should be regarded as expenditures that are a part of CJP's core function. As we said throughout the audit process, we would like to acquire a new case management system (CMS) that will make our operations more efficient and that will allow CJP to accept online complaints. (Our current CMS is more than 20 years

Letter to Elaine M. Howle, CPA
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Page 3

old.) We intend to begin investigating a new CMS right away. As a part of that investigation, we will determine whether the recommended budget increase is sufficient to pay for a new CMS, or whether we will need to seek additional funds to do so. We are also interested in the possibility of reducing overhead to free up money for operations, and will also begin investigating those possibilities right away. Any such overhead reduction will need to account for concerns for the safety of commissioners and CJP staff, as well as CJP's operational needs. We note that, if we are able to locate alternate state office space in the Bay Area, CJP would need a budget increase to cover the cost of a move to that office space.

In closing, CJP would like to acknowledge the professionalism demonstrated by the State Auditor's staff throughout the audit process.

Very truly yours,



Gregory Dresser
Director-Chief Counsel

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Comments

CALIFORNIA STATE AUDITOR'S COMMENTS ON THE RESPONSE FROM THE COMMISSION ON JUDICIAL PERFORMANCE

To provide clarity and perspective, we are commenting on CJP's response to the audit. The numbers below correspond to the numbers we have placed in the margin of CJP's response.

We agree that CJP cooperated with the audit once it began. However, as we note on page 66, the start of the audit was delayed for almost two years due to litigation with CJP.

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We do not opine on whether the amount of discipline CJP issues is appropriate compared to other states. Instead, we explain on page 77 that there were significant limitations in our ability to use information about other states, and we therefore did not use that information to support findings and conclusions.

②

We look forward to reviewing evidence of how CJP implements our recommendations. Our report describes significant gaps in CJP's oversight of potential patterns of judicial misconduct. On page 24, we describe how CJP's intake process does not identify patterns of complaints that—taken in the aggregate—could point to potential judicial misconduct. We also explain on page 26 that CJP lacks the data it needs to identify patterns of complaints related to legal error. Also, the section starting on page 27 discusses how investigators did not always consider the broader histories of allegations against judges when determining how to conduct their investigations. To better detect potentially chronic judicial misconduct, CJP will need to develop robust procedures for analyzing patterns of complaints, including those involving legal error.

③

We disagree with CJP's perspective. As we discuss on page 34, the Supreme Court has issued decisions concluding that CJP's investigative and adjudicatory structure does not violate judges' due process rights. Yet, these court decisions are decades old and rely in part on observations about CJP's structure that have since changed as a result of the passage of Proposition 190 in 1994, a constitutional amendment that increased the commission's adjudicatory authority. Since Proposition 190 made significant changes to CJP's structure, the Supreme Court has not ruled on whether CJP's current unitary structure creates due process concerns for judges. Further, we do not believe—as CJP indicates in its response—that the history of challenges to CJP's structure and authority are evidence there are no problems with CJP's current unitary structure. As Figure 12 on page 37 shows, the current unitary structure means that the commission is privy to unproven allegations when it

④

issues discipline. Further, as we state on page 36, a weakness of the commission's unitary structure is that the commission could be perceived as having prejudged cases. Finally, as we indicate on page 38, the current unitary structure hinders CJP from more fully realizing the intent of the voters. These problems with CJP's current unitary structure are the reasons why we recommend that the Legislature propose and submit to the voters an amendment to the California Constitution that would, among other things, restructure the commission as a bicameral entity.

- ⑤ CJP's observation that no other judicial discipline commission is structured exactly like the one we recommend does not undercut the need for or diminish the importance of the changes we have recommended. On page 36, we discuss how 17 states have adopted a bicameral structure for their judicial oversight commissions. Further, on that same page we discuss how the American Bar Association's model rules for judicial disciplinary enforcement recommend a bicameral structure that separates investigatory and adjudicative functions. To form our recommendation, we identified the components of these model rules that are relevant to California and CJP. The fact that we concluded California should adopt a structure and process for judicial discipline that is different from other states is not a cause for concern.
- ⑥ Due to final formatting of our report, the content to which CJP refers now appears on pages 2 and 34. On those pages, we state that although it is not identical in nature, CJP's structure is analogous to a jury in a criminal case being composed of detectives who investigated that case. CJP believes that this analogy is unfortunate and wrong. We disagree. Much like detectives who investigate allegations of criminal activity, commissioners are privy to allegations of misconduct that are not ultimately proven by evidence—which we illustrate in Figure 12 on page 37. In the criminal justice system, the roles of the investigator—a detective—and the ultimate decider—usually a jury—are purposefully separated to ensure that individuals receive impartial trials. However, as we explain throughout Chapter 2, the commission serves in both the investigative and adjudicative roles. Finally, nowhere in our report do we state or imply that commissioners are conducting CJP's investigations.
- ⑦ We stand by our conclusion that CJP spent 61 percent of its \$5.2 million budget on its core functions of intake, investigations, and formal proceedings. CJP's annual reports describe its support staff costs as part of its "general operations" and not as part of the costs related to intake, investigations, or formal proceedings. In the annual reports that cover our audit period, CJP has stated that it spent between 35 to 46 percent of its budget on its general operations. We recognize the important role of CJP's administrative

staff in supporting CJP's attorneys and executives. However, CJP's administrative staff do not review complaints at intake to determine if they merit investigation, perform investigations and make recommendations about possible discipline, or serve as attorneys during formal proceedings. Therefore, we do not believe they can reasonably be considered a part of the core function and mission for which the Legislature and the Governor annually appropriate CJP funding. Finally, this is the first time CJP has shared concerns with us about not including its support staff in this calculation despite the fact that we shared this conclusion with CJP twice during the audit.